Law Reform Commission

Wills and Succession Legislation

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CHAPTER 1

INTRODUCTION

Manitoba's succession legislation has received much of the Commission's attention over the past quarter of a century. Since 1974, the Commission has issued ten reports on various aspects of succession legislation,[1] which reports have resulted in a number of legislative amendments.

Several statutes have been reviewed in the course of preparing this Report with a view to ensuring the integrity and relevance of each statute, and that, as a whole, they operate as effectively and harmoniously as possible. Although the Commission focuses largely on *The Wills Act*,[2] an examination of relevant provisions of *The Law of Property Act*,[3] *The Intestate Succession Act*,[4] *The Marital Property Act*,[5] *The Dependants Relief Act*,[6] *The Trustee Act*,[7] and *The Court of Queen's Bench Rules* is also included.[8] As well, several provisions of *The Court of Queen's Bench Surrogate Practice Act*[9] have been considered, though no formal recommendations for their reform have been included in this Report.

The Commission acknowledges that this area of the law is highly technical, and that much of its language may be obscure to the lay reader. Instead of including a lengthy definitions section in this Report, the Commission recommends that the truly determined lay reader make use of one of the many good legal dictionaries in existence to assist their review of the recommendations made in this Report.

We have attached draft legislation as Appendix A which, we hope, will assist the reader

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[1] *An International Form of Will for Manitobans* (Report #17, 1974); *"The Wills Act" and Ademption* (informal report #9E, 1979); *"The Wills Act" and the Doctrine of Substantial Compliance* (Report #43, 1980); *An Examination of "The Dower Act"* (Report #60, 1984); *Intestate Succession* (Report #61, 1985); *The Testators Family Maintenance Act* (Report #63, 1985); *Sections 33 and 34 of "The Wills Act"* (Report #67, 1986); *Section 23 of The Wills Act Revisited* (informal report #22B, 1992); *Lapsed Residual Gifts in Wills* (informal report #24B, 1994); *Security for the Administration of Estates* (informal report #24C, 1994).

[2] *The Wills Act*, C.C.S.M. c. W150.

[3] *The Law of Property Act*, C.C.S.M. c. L90.

[4] *The Intestate Succession Act*, C.C.S.M. c. I85.

[5] *The Marital Property Act*, C.C.S.M. c. M45.

[6] *The Dependants Relief Act*, C.C.S.M. c. D37.

[7] *The Trustee Act*, C.C.S.M. c. T160.

[8] *The Court of Queen's Bench Rules*, Man. Reg. 553/88.

[9] *The Court of Queen's Bench Surrogate Practice Act*, C.C.S.M. c. C290.

in better understanding the recommendations contained in this Report. Also as the Report contains several references to the *1989 Hague Convention on the Law Applicable to Succession to the Estates of Deceased Persons* and adopts some of its provisions, it has been attached as Appendix B.

A. TERMINOLOGY

No distinction is made in this Report between the words "testator" and "testatrix" or "executor" and "executrix". The Commission regards "testator" and "executor" as gender neutral and it is as such that these terms are used throughout the Report.

B. ACKNOWLEDGEMENTS

The Commission wishes to thank Prof. Cameron Harvey of the Faculty of Law, University of Manitoba, who initiated this project. His comprehensive and detailed analysis of the current law and his suggestions for reform were of great assistance in reaching our final conclusions. We also wish to thank Mr. Jonathan G. Penner and Ms Blane Morgan, independent researchers, who prepared the Report and draft legislation for publication. It should be noted that the recommendations contained in this Report are those of the Commission and are not necessarily in agreement with those of our consultants.

CHAPTER 2

THE WILLS ACT

This Report is primarily concerned with the reform of the single most important piece of succession legislation in Manitoba: *The Wills Act*. Like that of many other common law jurisdictions, it is based on the English *Wills Act, 1837*,[1] introduced in an attempt to rationalize and simplify the law as it then was. Over time, however, it became apparent that the legislation itself required simplification and rationalization, and something akin to a cottage industry in reviewing and recommending reforms to wills legislation has taken root in Canadian and other common law jurisdictions.[2]

In this Chapter, Manitoba's *Wills Act* is reviewed in its entirety and it is hoped that the discussion and recommendations that follow will serve as an impetus for reforms that will ensure the viability of *The Wills Act* well into this new millennium.

A. FORMAL VALIDITY

A valid will (or codicil, i.e., an addition to a will) must meet five criteria, namely:

- requisite intention;
- capacity, both as regards age and mental capacity;
- knowledge and approval;
- due form; and
- due execution.

Simply put, in order for a will to be valid it must be authored by a person who intends to make a

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[1] *Wills Act, 1837* (U.K.), 1 Vict,. c. 26.

[2] In addition to the Commission's Reports referred to above in Chapter 1, examples of such projects include: Ontario Law Reform Commission, *The Proposed Adoption in Ontario of The Uniform Wills Act* (Report, 1968); Law Reform Committee (UK), *Interpretation of Wills* (Report #19, 1973); Ontario Law Reform Commission, *The Impact of Divorce on Existing Wills* (Report, 1977); Queensland Law Reform Commission, *The Law Relating to Succession* (Report #22, 1978); Law Reform Committee (UK), *The Making and Revocation of Wills* (Report # 22, 1980); Law Reform Commission of British Columbia, *The Making and Revocation of Wills* (Report #52, 1981); Law Reform Commission of British Columbia, *Interpretation of Wills* (Report #58, 1982); Law Reform Commission of British Columbia, *Statutory Succession Rights* (Report #70, 1983); New South Wales Law Reform Commission, *Wills - Execution and Revocation* (Report #47, 1986); Law Reform Commission of British Columbia, *Wills and Changed Circumstances* (Report #102, 1989); Law Reform Commission of Western Australia, *Effect of Marriage or Divorce on Wills* (Report, 1991); Alberta Law Reform Institute, *Effect of Divorce on Wills* (Report #72, 1994); Victorian Law Reform Committee, *Reforming the Law of Wills* (Report, 1994); New Zealand Law Commission, *Succession Law: A Succession (Adjustment) Act* (Report #39, 1997); Queensland Law Reform Commission, *The Law of Wills* (Report #52, 1997); New South Wales Law Reform Commission, *Uniform Succession Laws: The Law of Wills* (Report #85, 1998); Alberta Law Reform Institute, *Wills: Non-Compliance with Formalities* (Report #84, 2000).

will, who is of at least a certain age and of sound mind, and who has knowledge of, and approves of, the contents of the will. Further, the will must meet certain requirements as to form: for example, it must be in writing, and it must be properly executed. Failure to satisfy any of these five requirements will invalidate a purported will.

The Wills Act includes requirements as to age, form and execution but, curiously, fails to address the requirements of intention, mental capacity, and knowledge and approval. If, as is often taken as a given, the legislation ought to provide instruction to testators, these omissions must be regarded as a significant shortcoming.

Although *The Court of Queen's Bench Surrogate Practice Act* addresses some of the missing prerequisites, such as mental capacity and knowledge,[3] it too is silent as to the requirements of intention and approval. In any event, the presence of additional criteria in that Act does nothing to further the instructional goals of *The Wills Act*.

Not only does its incompleteness provide inadequate instruction to testators, but the fact that the Act only addresses half of the requirements for a valid will creates several potential ambiguities, as, for example, in respect to clauses 16(b) and (c). Those provisions state:

> **Revocation in general**
> 16. A will or part of a will is not revoked except as provided in subsection 18(2) or
> ...
> (b) by a later will valid under this Act; or
> (c) by a later writing declaring an intention to revoke it and made in accordance with the provisions of this Act governing the making of a will; ....

Although a will or writing would not normally be valid unless it had been made with the requisite intention, mental capacity, and knowledge and approval, the wording of these clauses suggests that, as long as the testator is of the required age and due form and execution have been observed, i.e., as long as the will is "valid under this Act" or the writing is "made in accordance with the provisions of this Act" ("this Act" meaning *The Wills Act* in each case), an otherwise invalid will or writing *could* be effective to revoke a previous will.

The phrase "made in accordance with the provisions of this Act" is similarly used in subsection 19(1) of the Act (which deals with alterations to wills) and section 20 (dealing with revival of revoked wills) makes reference to a will or codicil "made in accordance with this Act". In each case, the reference to "this Act" introduces the same ambiguities contained in clauses 16(b) and (c) of the Act, noted above.

The Commission believes that the most effective way to deal with such ambiguities, and to ensure that *The Wills Act* provides useful guidance to testators, is to incorporate into the

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[3] *The Court of Queen's Bench Surrogate Practice Act*, C.C.S.M. c. C290, ss. 22(2) and 22(5) in the case of holograph wills.

legislation the missing common law requirements for a valid will, so that it sets out all the requirements for validity. More particularly, the Commission believes that the reform of *The Wills Act* should begin with the consolidation and expansion of the current requirements for a valid will (set out primarily in sections 3, 4 and 8 of the Act) into a single, comprehensive statement of the elemental requirements for a valid will.

RECOMMENDATION 1

The Wills Act *should provide a complete, consolidated listing of the fundamental requirements for a valid will.*

B. EXECUTION REQUIREMENTS

The most important provision concerning the execution of wills is section 4 of the Act. It reads:

> **Signatures required**
> **4** Subject to sections 5 and 6, a will is not valid unless,
> (a) at its end it is signed by the testator or by some other person in the presence and by the direction of the testator;
> (b) the testator makes or acknowledges the signature in the presence of two or more witnesses present at the same time; and
> (c) two or more of the witnesses attest and subscribe the will in the presence of the testator.

Each of these criteria is subject to multiple interpretations, and it is therefore not surprising that section 4 has generated considerable litigation.

1. Position of Testator's Signature

Clause 4(a) requires a will to be signed by the testator or person signing on behalf of the testator "at its end".[4] It is not clear from the wording of the clause whether the signature must appear at the physical end of the will or whether it is sufficient if the testator's (or proxy's) signature appears at the temporal end of the will.[5]

While there may be compelling reasons to prefer the customary placement of signatures at the physical end of a document, suggesting, as it does, that the signatory has knowledge of or agrees with the contents that precede his or her signature, the Commission is of the view that a will should not be rendered invalid solely because the testator's (or proxy's) signature appears other

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[4]Section 6, in the case of holograph wills.

[5]"Temporal end" meaning signed after all of the dispositive provisions were written.

than at the physical end of the will. Subsection 7(1), which deems a will

> ... to be signed at its end if [the signing] ... is placed at, or after, or following, or under, or beside, or opposite to, the end of the will so that it is apparent on the face of the will that the testator intended to give effect by the signature to the writing signed as the testator's will.

does not deal with a signature placed elsewhere than proximate to the physical end of the will.

Notwithstanding section 23 of the Act which empowers the court to give effect to a will that does not meet the formal requirements of the Act, the Commission is of the view that the Act should provide (as does clause 9(b) of the *Wills Act, 1837*)[6] that a will is satisfactorily signed if "it appears that the testator intended by his signature to give effect to the will." In the English case of *Wood* v. *Smith*,[7] interpreting clause 9(b), the Court ruled that it did not matter whether the signature was at the physical or temporal end of the will as long as it was clear from the evidence that the testator intended to give effect to the will.

RECOMMENDATION 2

The Act should provide that a will is valid if it appears that the testator intended by his signature to give effect to the will.

2. Signature by Proxy

According to clause 4(a) of the Act, a will is not valid unless "it is signed by the testator or by some other person in the presence and by the direction of the testator". As regards signature by a proxy, there has been some controversy about whether a proxy must sign the testator's name, his or her own name, or both names.[8] In its Report, *The Making and Revocation of Wills*,[9] the Law Reform Commission of British Columbia noted that it could find no reason to prefer one form of signature over another. Accordingly, it recommended the addition of a discrete section to British Columbia's Act explicitly allowing a proxy to sign a will in the testator's name, in his or her own name, or in both names.[10] This Commission shares these views and likewise recommends

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[6] *Wills Act, 1837* (U.K.), 1 Vict., c. 26, s. 9(b), as amended by the *Administration of Justice Act 1982* (U.K.), 1982, c. 53, s. 17.

[7] *Wood* v. *Smith*, [1992] 3 All E.R. 556 (C.A.) - the testator did not sign the will at the end and stated to the witnesses that his writing "My Will by Percy Winterbone" at the beginning was sufficient signature. The testator did not sign at the physical or temporal end of the will but it was clear from the surrounding circumstances that he clearly intended to give effect to the will.

[8] See, for example, *Re Deeley and Green* (1929), 64 O.L.R. 535 (H.C.) and *Re Fiszhaut Estate* (1966), 55 W.W.R. (NS) 303 (B.C.S.C.).

[9] Law Reform Commission of British Columbia, *The Making and Revocation of Wills* (Report #52, 1981) [BCLRC].

[10] *Id.*, at 30.

that a similarly flexible provision be included in *The Wills Act*.

RECOMMENDATION 3

The Act should provide that a person signing a will on behalf of a testator may sign the testator's name, his or her own name, or both names.

3. Witnesses Attesting and Subscribing the Will

Clause 4(c) requires two or more witnesses to "attest and subscribe the will in the presence of the testator" which raises another issue: Does this mean that witnesses must have some knowledge about the contents of the will? The case law does not require the testator to inform the witnesses that the document on which the testator's signature appears is a will.[11]

Requiring witnesses to "attest" the will may mean that they must bear witness to the will; that is to say, perhaps, that witnesses must be able to testify about the contents of the will or at least the unaltered or altered condition of the various pages comprising the will. This latter requirement would be fulfilled in cases where both the testator and witnesses sign or initial each page of a will.[12] It is the Commission's understanding that the signing or initialing of each page of a will by the testator and witnesses is not a universal practice in Manitoba, and that many wills at their end simply bear the signatures of witnesses attesting the signature of the testator. It is our further understanding that, as regards the majority of wills, the courts do not routinely require any additional identification of pages, though they are entitled to do so under the *Queen's Bench Rules*.[13]

On this point, the Australian National Committee for Uniform Succession Laws noted that "the purpose of the witnessing requirement is simply to verify the authenticity of the testator's signature, and to ensure that the testator is signing voluntarily". The Committee affirmed the testator's "right to make a will without having to disclose its contents to a witness, and without even having to disclose to a witness that the testator is making a will."[14] We concur and so recommend.

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[11] *Cullen Estate* v. *Cullen* (1905), 35 S.C.R. 510.

[12] This manner of bearing witness to a will is consistent with the requirements of *The Court of Queen's Bench Rules*, Man. Reg. 553/88, Rule 74.02(7) (Identification of Pages of Will"), which essentially states that if a will consists of more than one page, unless each page is signed or initialled by the testator and the witnesses, the court may require such identification as it deems necessary.

[13] *Court of Queen's Bench Rules*, Man. Reg. 553/88, Rule 74.02(7).

[14] See, Queensland Law Reform Commission, *Consolidated Report to the Standing Committee of Attorneys General on the Law of Wills* (Misc. Paper #29, 1997) 12 [QLRC].

RECOMMENDATION 4

The Act should provide that a will is validly executed even if any or all of the witnesses did not know that it was a will.

If a testator signs or acknowledges his or her signature in the presence of one witness who then signs the will, and then acknowledges the signature in the presence of that witness and another witness who thereafter signs it, the will is invalid.[15] Logically, although not expressly,section 4 requires the witnesses to sign the will after the testator has signed. In a *Re Brown* situation, section 4 does not provide for the first witness to acknowledge his or her signature along with the testator's acknowledgment of his or her signature.

Though such situations may arise infrequently, it does not make sense to require the first witness to sign the will again. We believe it should be sufficient for the first witness to acknowledge his or her signature to the second witness *in the presence of the testator*.

RECOMMENDATION 5

The Act should provide that, if the first witness signs the will in the presence of the testator only, he or she need only acknowledge his or her signature to the second witness in the presence of the testator.

4. Privileged Wills

Subsection 5(1), which provides for "privileged wills", allows members of the Canadian Forces, or other naval, land or air force, seamen or mariners to make wills without the usual formalities of execution.

> A member of the Canadian Forces while on active service pursuant to the National Defence Act (Canada), or a member of any other naval, land, or air force while on active service, or a mariner or a seaman when at sea or in the course of a voyage, may make a will by a writing signed at its end by the testator or by some other person in the presence and by the direction of the testator without any further formality or any requirement of the presence of, or attestation or signature by, a witness.

No witnesses are required and any person may handwrite the will, not just the testator, as required for a valid holograph will.

Privileged wills were first developed by the Romans and were carried over into the common law of England. They were codified in the first English *Wills Act* in 1540, continued in the *Statute of Frauds, 1677* and then in the *Wills Act, 1837*. The rationale behind privileged wills

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[15] *Re Brown* [1954] O.W.N. 301 (Ont. Surr. Ct.).

was well summarized by the New South Wales Law Reform Commission in its 1986 Report:[16]

- the relatively low level of education of privileged testators;
- the unavailability of consultation and professional advice to military personnel, especially when they are on campaign or in combat (they were said to be *inops consilii*, ie without advice);
- the high risk of death faced by testators when in combat or at sea in comparison with the community generally;
- the privilege is conferred as a reward and incentive to engage in a socially beneficial occupation;
- soldiers and others facing battle need the comfort of knowing that, should they not return, arrangements have been made for their affairs;
- the need to ensure that minors who were called upon to serve in a military capacity and thereby risk early death had the "adult" privilege of making and revoking wills.

It is our understanding that the current practice of the Canadian Forces is to encourage its personnel to complete a will upon joining and then to update their will at regular and logical intervals (new posting, deployment overseas, change in marital status and upon the birth of children). As the Law Reform Commission of British Columbia commented in its 1981 report:

> Forces personnel are probably more conscious of the necessity to maintain an accurate will than other members of the general public.[17]

Given modern communications technology and military practice, soldiers and sailors are no longer completely isolated when in combat or at sea. As well, many civilian occupations (firefighters, police officers, forestry workers) carry considerable risk; however, the privilege has not been extended to these individuals.

Although England retains the privilege, it should be noted that the English law does not permit holograph wills signed *solely* by the testator. On the other hand, New South Wales has abolished privileged wills as have 16 states of the United States which have adopted the *Uniform Probate Code*.

We believe that the section has become obsolete and that the need for privileged wills no longer exists. In addition, current Manitoba legislation permits holograph wills made wholly in the person's own handwriting and signed at its end by the person (section 6) and gives the court the power to dispense with formal requirements of execution (section 23). The intestate succession and dependants relief legislation also provides for the orderly distribution of estates and the support of dependants when someone dies without a will. Accordingly, in our view, repeal of this provision would have very little adverse effect as, according to the Registrar of Probate of the

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[16]New South Wales Law Reform Commission, *Wills - Execution and Revocation* (Report #47, 1986) 145-146 [NSWLRC].

[17]BCLRC, *supra* n. 9, at 26, citing a telephone call from Lieutenant-Colonel Macdonald, Judge-Advocate General's Office, Ottawa, on July 16, 1980.

Court of Queen's Bench, privileged wills are rarely submitted for probate and those which have been submitted were typically executed during the Second World War. We therefore recommend that the provision be repealed but that, in order to preserve the validity of any privileged wills which may be in existence at the time of repeal, repeal should not be made retroactive.

RECOMMENDATION 6

Privileged wills should no longer be valid but provision should be made that those in existence at the time of the coming into force of the new legislation remain valid.

5. Minors

According to section 8 of the Act, a will is only valid if the testator is at least 18 years of age at the time of making the will unless, at that time, the person is or has been married; is a member of the Canadian Armed Forces' regular force; or is entitled to make a "privileged" will under section 5 of the Act.

In its 1981 Report, the Law Reform Commission of British Columbia recommended that the section in British Columbia's Act, comparable to section 8 of Manitoba's Act, be amended to permit a minor to apply to the court for a declaration that he has testamentary capacity notwithstanding that he has not reached the age of majority.[18] The Australian *Wills Bill 1997*[19] would also empower the court to authorize a minor to make, alter or revoke a will. Unlike the British Columbia recommendation, however, the Australian provision would only permit the court to authorize the making of a specific will, or specific alterations. It would also require the court to satisfy itself of, among other things, the reasonableness of the minor's will, alteration or revocation.

Alberta's Legislature has taken an even more restrictive approach. That province's legislation provides:[20]

> Notwithstanding subsection (1) a person who
> (a) is under the age of 18 years,
> (b) is unmarried, and
> (c) has children,
> may make a valid will to the extent that that person makes a bequest, devise or other disposition to or for the benefit of any or all of those children.

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[18]BCLRC, *supra* n. 9, at 19. The recommendation has not yet been implemented.

[19]Queensland Law Reform Commission, *The Law of Wills* (Report #52, 1997), Appendix 2 [QLRC].

[20]*Wills Act*, R.S.A. 2000, c. W-12, s. 9(3).

In our view, these approaches are too restrictive. We note that there are a number of statutes in Manitoba which regulate the capacity of young people to participate in "adult" activities. In respect of some, the age of majority (18) is the threshold criterion. The right to vote, the right to be on licensed premises and the right to marry without parental approval are among the rights secured at the age of 18. Other statutes set lower age limits in respect to other privileges and activities. Both the ages of 16 and 12 are operative in certain situations. Some examples which set the age at 16 include: *The Highway Traffic Act* (driving an automobile), *The Public Schools Act* (leaving school), *The Insurance Act* (entering into a contract) and *The Employment Standards Code* (seeking employment).

Given the sophistication of many of today's youths, the Commission is of the view that a minor who has attained the age of 16 should not be required to apply to the court to make a valid will and would therefore recommend that the age requirement be set at 16. If the will meets all of the other formal requirements of a valid will, that is: mental capacity, knowledge and approval, due form, and execution, we do not believe that lowering the age to 16 will prove problematic.

RECOMMENDATION 7

The age at which a person can make a valid will should be set at 16 years.

6. Definition of Handwriting

Section 6, which concerns holograph wills, states in part "...[a] person may make a valid will wholly in the person's own handwriting ...." The Saskatchewan *Wills Act* was, for a time, unique in defining "handwriting" to include "(i) footwriting; (ii) mouthwriting; and (iii) writing of a kind similar to those mentioned in ... (i) and (ii)".[21] Such a definition makes it clear that persons who cannot use their hands to write may still, for example, make a valid holograph will.

In light of section 23 of Manitoba's Act, which authorizes the court to waive strict compliance with the Act's formalities, probably it is not necessary to define "handwriting" in Manitoba's legislation given the fact that "writing" is defined in *The Interpretation Act* as "the representation of words in visible form by any means". Even so, to the extent that the legislation is intended to serve an instructional purpose, the Act would benefit from the inclusion of a definition of "handwriting".

RECOMMENDATION 8

"Handwriting" should be defined in the Act to include mouthwriting, footwriting, and similar kinds of writing.

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[21] *The Wills Act*, R.S.S. 1978, c. W-14, s. 2, as amended by S.S. 1989, c. 66, s. 3. This provision was not continued in *The Wills Act, 1996*, S.S. 1996, c. W-14.1.

7. Video Tape, Cinematographic and Electronic Wills

Advances in technology have created new issues that the drafters of the current legislation could not have foreseen, for example, whether video tape, cinematographic and electronic wills are (or ought to be) admissible to probate.

The threshold question raised by these new forms of wills is whether they comply with section 3 of the Act, which states that "[a] will is valid only when it is in writing."

(a) Video tape and cinematographic wills

Video tape and cinematographic wills can be either one of two types:

- a video tape or film that includes video tape or film of a written, executed will; or
- a video tape or film of a testator reading a will or stating what he or she intends respecting the matters usually addressed in a will.

With the former type of video tape or film, if the actual will does not exist at the testator's death, a video tape or film that actually contains an image of the will is potentially admissible to probate in the same manner as a photocopy of the will would be, i.e., as a document evidencing a written and executed will. This being the case, no amendment to the Act would appear to be required on the question of admissibility.

Relevant issues raised by this type of video tape or film relate to whether the missing will is simply lost or was destroyed to revoke it, the capacity of the testator and due execution of the will. Affidavit evidence expressly related to the video tape or film would have to be tendered to establish the testator's capacity, and perhaps the will's due execution (though with respect to this last point, the presumption of regularity would apply in favour of the will's validity).[22]

In the case of a video tape or film of a testator simply reading a will or expressing his or her wishes, no image of the writing comprising the will exists on the tape or film. If a duly executed written will never existed, such a video tape or film cannot possibly comply with the writing requirement of section 3, amounting to what is essentially an oral will, inadmissible to probate.

It might be argued that a video tape or film provides evidence of authenticity superior to a completely oral will, and should therefore be admissible to probate. It must be acknowledged, however, that video tape and film can be "doctored" in ways that are almost undetectable.

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[22] See, *inter alia*, *Re Haverland*, [1975] 4 W.W.R. 673 at 684-687 (Alta. S.C.).

Furthermore, jurisdictions that recognize oral wills normally require more than two witnesses to validate such wills. It seems to the Commission that the consistent testimony of three or more witnesses in respect of an oral will is as reliable as, if not more reliable than, an unwitnessed oral will recorded on video tape or film.

If wills of this nature were to be made admissible to probate, consistency would also require that straightforward oral wills that can be authenticated by several witnesses be admissible to probate (as they once were).[23] The Commission is not convinced of the necessity or desirability of either amendment and, accordingly, makes no recommendation in this regard.

Mention should also be made of one additional situation that does not fall precisely into either of the preceding categories. If a duly executed written will is known to have existed, but cannot be located after the death of the testator, and the court is satisfied that the will was lost, as opposed to intentionally destroyed to revoke it, a video tape or film of the testator reading the will out loud or saying what is in the will could be evidence of the contents of the will. As such, it would be admissible under the existing legislation; no amendment would be necessary to accommodate such a situation.

(b) Electronic wills

An electronic will is a will that exists solely in a computer (or on a computer diskette), and exists only in the form of electronic impulses, albeit of which a printout can be made. Such a will has, in fact, been admitted to probate in Québec.[24] The Court in that case relied on Article 714 of the Québec *Civil Code*,[25] which is comparable to section 23 of the Manitoba Act. Article 714 provides:

> A holograph will or a will made in the presence of witnesses that does not meet all the requirements of that form is valid nevertheless if it meets the essential requirements thereof and if it unquestionably and unequivocally contains the last wishes of the deceased.

Manitoba's section 23 provides:

> **Dispensation power**
> **23** Where, upon application, if the court is satisfied that a document or any writing on a document embodies
> (a) the testamentary intentions of a deceased; or
> (b) the intention of a deceased to revoke, alter or revive a will of the deceased or the testamentary intentions of the deceased embodied in a document other than a

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[23] See C.V. Margrave-Jones, *Mellows: The Law of Succession* (5th ed., 1993) paras. 7.5-7.7.

[24] *Rioux* v. *Coulombe* (1996), 19 E.T.R. (2d) 201 (Que. S.C.).

[25] *Civil Code*, S.Q. 1991, c. 64, art. 714.

will;

the court may, notwithstanding that the document or writing was not executed in compliance with any or all of the formal requirements imposed by this Act, order that the document or writing, as the case may be, be fully effective as though it had been executed in compliance with all the formal requirements imposed by this Act as the will of the deceased or as the revocation, alteration or revival of the will of the deceased or of the testamentary intention embodied in that other document, as the case may be.

Unlike section 23, Article 714 of Québec's *Civil Code* permits the court to waive compliance with the formal requirements only where there has been substantial compliance with the Act. As the Québec legislation requires testamentary instruments to be in writing,[26] it is difficult to understand the basis on which a court could conclude that an electronic will "meets the essential requirements" of either a holograph will or an attested will. What is more essential than writing?[27]

As to whether an electronic will could be admitted to probate under section 23 of the Manitoba Act, the answer depends on whether a computer hard-drive or a diskette is "a document or any writing on a document". If either is held to be "a document or any writing on a document", the court would be entitled to give effect to a will contained in the hard-drive or the diskette, as the case may be, under section 23 of the Act. (Note that the general dispensation power in section 23 is considerably broader than its counterpart in Québec's *Civil Code*, which requires that a will be in substantial compliance with the *Code*.)

Electronic wills raise other significant probate issues not satisfactorily addressed by the Québec court.[28] The reliability of a will that exists solely in electronic form must be highly suspect, as manipulation of computer data is even easier to effect, and even more difficult to detect, than manipulation of video tape or film images.

The law has always contemplated wills as formalistic juridical acts that depend on compliance with certain formalities for their effectiveness; the notion of admitting electronic wills to probate appears to come very close to admitting to probate nothing more than the mere thoughts of the deceased.[29] The Alberta Law Reform Institute recently recommended that "[t]he [court's] dispensing power should not extend to allowing electronic records to be admitted to probate".[30] Because of the concerns noted above, the Commission concurs with that sentiment. In its opinion, *The Wills Act* should clarify that the dispensation power established by section 23 may not be

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[26] *Civil Code*, S.Q. 1991, arts. 712, 717, 726 and 727.

[27] An interesting and useful discussion of the issues surrounding electronic wills can be found in N. Kasirer, "From Written Record to Memory in the Law of Wills" (1997-1998), 29 Ott. L. Rev. 39.

[28] *Rioux* v. *Coulombe*, *supra* n. 24. See also Kasirer, *supra* n. 27.

[29] Kasirer, *supra* n. 27.

[30] Alberta Law Reform Institute, *Wills: Non-compliance with Formalities* (Report #84, 2000) 45 [ALRI].

exercised in respect of electronic wills.

RECOMMENDATION 9

The Act should prohibit the admission to probate of wills that exist only in electronic form.

8. Postscripts to Holograph Wills

Section 7 of the Act, discussed earlier, essentially states that, even if the testator's signature may not technically be at the "end" of the will, the will is not rendered invalid if the signature is in that vicinity and it is apparent that the signature was intended to give effect to the will. This leniency with respect to the placement of the signature is qualified by subsection 7(3), which states that a signature that conforms to the Act nonetheless will not give effect to a disposition or direction underneath or following the signature, or that was inserted after the signature was made.

In 1968, the Court of Appeal held that the provisions of section 7 (including subsection (3)) did not apply to holograph wills[31] and, in subsequent cases, the courts showed a willingness to validate writing that appeared beneath the signature of the testator on a handwritten letter[32] and a conventional holograph will.[33]

However, in 1983 the holograph will provision (section 6) was amended to require holograph wills, like other wills, to be signed "at the end". Presumably, therefore, postscripts to holograph wills of the type recognized by the courts prior to the 1983 amendment would thereafter be invalid pursuant to subsection 7(3). The Commission considers that, as postscripts are not uncommon, the previous state of the law was salutary and was preferable to the present situation.

RECOMMENDATION 10

The Act should provide that a handwritten postscript on a holograph will apparently written at the same time as the will is not invalidated if it appears the testator intended the writing to be part of the will.

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[31] *Re Tachibana Estate* (1968), 63 W.W.R. (NS) 99 (Man. C.A.).

[32] *Re Williams*, [1973] 5 W.W.R. 84 (Man. Surr. Ct.).

[33] *Potter's Estate* v. *Potter* (1981), 12 Man. R. (2d) 396 (Q.B.).

9. Publication

All Canadian Wills Acts contain a section comparable to section 10 of Manitoba's Act, which provides:

> **Publication**
> **10** A will made in accordance with this Act is valid without other publication.

Section 10 is derived from the *Wills Act, 1837*.[34] Though it is not clear whether the section was intended to codify or supersede the common law, the Commission notes that, like publication, neither the dating of a will nor the inclusion of either an attestation or a testimonium clause is necessary for the formal validity of a will. This is not to say that the date and due attestation do not have to be proved, as the *Queen's Bench Rules*[35] and *The Court of Queen's Bench Surrogate Practice Act*,[36] respectively, require their proof before a will may be admitted to probate. Nevertheless, a will can be formally valid without either feature.

Section 10 serves an instructional purpose and, for that reason, the Commission is persuaded that it should be retained. Since, like publication, neither the dating of a will nor the inclusion of an attestation or testimonium clause is necessary for the formal validity of a will, for the sake of consistency and the better to serve its instructional goals, the Commission believes that it would be salutary for section 10 to make reference to these latter elements as well.

RECOMMENDATION 11

The Act should provide that, subject to the requirements of* The Queen's Bench Rules *and* The Court of Queen's Bench Surrogate Practice Act, *a will need not be dated and need not include either a testimonium clause or an attestation clause.

C. INCOMPETENCY OF WITNESSES

Section 11 of the Act provides that a will is not invalid merely because one of the witnesses either was incompetent (as a witness) at the time the will was executed, or subsequently became incompetent. Though in today's context the section may seem somewhat alarming, stating as it does that a will attested by an incompetent witness is not invalid on that basis alone, its inclusion

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[34] *Wills Act, 1837* (U.K.), 1 Vict. c. 26, s. 13.

[35] *Court of Queen's Bench Rules*, Man. Reg. 553/88, Rule 74.02(11).

[36] *The Court of Queen's Bench Surrogate Practice Act*, C.C.S.M. c. C290, s. 22(2).

in the *Wills Act, 1837*[37] made sense. Historically, there were numerous bases on which a witness could be found to be incompetent, some more serious than others. However, over time most of those numerous bases have been removed through legislative reform, so that today witness incompetency is essentially based solely upon mental impairment and age.[38]

Section 11 is surely an anachronism insofar as it maintains the validity of a will attested by a witness who lacks the required mental capacity, or who is too young, to be a witness. The Commission is of the view that section 11 ought to be revised to reflect the present day understanding of witness incompetency. The competence of a witness is relevant only at the time of the execution of the will; subsequent incompetence is irrelevant as long as it can be proved that, at the time of execution, the witness was competent to be a witness.

RECOMMENDATION 12

The Act should provide that a will is invalid if a person who attested it was incompetent as a witness at the time of attestation, but not if the person became incompetent only after attesting it.

Section 11 would also be more instructive if it expressly indicated who can be a witness. It seems to the Commission that a person who is competent to make a will should also be able to attest a will. As well, section 11 could usefully codify the common law rule that a blind person cannot be a witness to a will.[39] Lastly, because of the potential for abuse, the Commission believes that section 11 ought to include a provision overruling the 19th century case law which allows a person signing a will on behalf of a testator to attest the will as well.[40]

RECOMMENDATION 13

The Act should provide that any person competent to make a will, other than a person unable to see sufficiently to attest the testator's signature and a person who signs a will on behalf of the testator, can act as a witness to a will.

D. REVOCATION BY MARRIAGE

By virtue of sections 16(a) and 17 of the Act, except in limited circumstances, the marriage of a testator automatically revokes an existing will. These sections provide:

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[37] *Wills Act, 1837* (U.K.), 1 Vict., c. 26, s. 14.

[38] J. Sopinka, S.N. Lederman, & A.W. Bryant, *The Law of Evidence in Canada* (2nd ed., 1999) chap. 13.

[39] *Re Gibson*, [1949] 2 All E.R. 90 (P, D & A).

[40] *Theobald on Wills*, (14th ed., 1982) 42.

Revocation in general

16 A will or part of a will is not revoked except ...

(a) subject to section 17, by the marriage of the testator;....

Revocation by marriage

17 A will is revoked by the marriage of the testator except where

(a) there is a declaration in the will that it is made in contemplation of the marriage; or

(b) the will is made in exercise of a power of appointment of real or personal property which would not, in default of the appointment, pass to the heir, executor, or administrator of the testator or to the persons entitled to the estate of the testator if the testator died intestate.

It is arguable that the automatic revocation of a will by marriage no longer serves its original purpose, and that clause 16(a) could therefore be repealed. The originating provision was apparently included in the *Wills Act, 1837*[41] in order to protect the children of a marriage, as opposed to the spouse who already had adequate protection through dower, curtesy (equivalent to today's *Marital Property Act*), and marriage settlements.[42] However, since children do not succeed under *The Intestate Succession Act*[43] (except in limited circumstances), a child of a testator would not stand to benefit from the automatic revocation of the will upon marriage in any event, arguably frustrating the original purpose of clause 16(a).

The desirability of provisions similar to clause 16(a) has been considered by the English Law Reform Committee[44] and the Law Reform Commission of British Columbia, [45] both of which concluded that the current provision should be retained. The Committee stated:

> In our view, the case for repealing section 18 is by no means made out. The rule is well known to lawyers and laymen, it has operated satisfactorily since 1837 and the social and legislative changes which have taken place since then have not created a need to amend it.[46]

The British Columbia report quoted a submission from a correspondent who said:

> I think that the rationale behind the present law is sound. A testator should consciously disinherit his spouse and children. They are, I think, *prima facie* entitled to what the law gives them on intestacy. A testator is, of course, free to take that away if he so wishes, but he should do it by a

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[41] *Wills Act, 1837* (U.K.), 1 Vict., c. 26, s. 18.

[42] L. McKay, "The Contemporary Validity of Section 18 Wills Act 1837" (1975-77), 8 Vict. U. of Wellington L.R. 246 at 251-252.

[43] *The Intestate Succession Act*, C.C.S.M. c. 185.

[44] Law Reform Committee (UK), *The making and revocation of wills* (Report #22, 1980) at 11-12 [LRC(UK)].

[45] BCLRC, *supra* n. 9, at 71-73.

[46] LRC(UK), *supra* n. 44, at 12.

conscious act.[47]

Like the English Law Reform Committee and the Law Reform Commission of British Columbia, and for the same reasons, we are persuaded that the automatic revocation of a will by marriage should continue to be the law in Manitoba, i.e., that sections 16(a) and 17 should be retained. Nonetheless, section 17 gives rise to two significant problems that the Commission believes ought to be remedied.

1. Declaration

According to clause 17(a), an existing will is revoked by the marriage of the testator except where "there is a declaration in the will that it is made in contemplation of the marriage". Regrettably, it is not clear from the provision whether an actual declaration that the will is made in contemplation of marriage is required, or whether the requirement may be satisfied by an expression of the contemplation from which the required declaration can be inferred.

Unfortunately, the case law on this point is inconsistent. In *Re Pluto*,[48] the Court took a very formalistic approach in its construction of "declaration" and refused to admit extrinsic evidence of the surrounding circumstances. In that case, the testator made a will the day before his wedding in which he gave his house and contents to "my wife, Mary Beatrice Pluto" but without an express declaration of his comtempated marriage to Mary Beatrice Marriott. The Court held that the marriage had revoked the will.

Contrast this with the recent case of *Re Ratzlaff Estate*[49] in which the testator made a will one month before his marriage which provided that "if at the time of my death I am legally married, then ... I specifically bequeath to my wife the sum of $10,000 for each year or portion thereof we have cohabited together as man and wife". The Court in this case was much less demanding in its construction of "declaration" and admitted evidence of the surrounding circumstances to find that the will was made in contemplation of marriage.

Until 1982, the governing legislation in the United Kingdom, comparable to clause 17(a), was section 177 of the *Law of Property Act 1925*,[50] which merely required wills to be "expressed to be made in contemplation of a marriage". Courts in that country, and in New Zealand and

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[47] BCLRC, *supra* n. 9, at 72.

[48] *Re Pluto* (1969), 6 D.L.R. (3d) 541 (B.C.S.C.).

[49] *Re Ratzlaff Estate* (2002), 212 D.L.R. (4th) 258 (Sask. C.A.).

[50] *Law of Property Act 1925* (U.K.), 1925, c. 20.

Australia, interpreting similarly worded legislation, have held that words such as "my fiancée",[51] "my future wife",[52] and "my intended wife"[53] are satisfactory expressions of the required contemplation.[54]

In 1982, following a recommendation of the Law Reform Committee,[55] the United Kingdom Parliament repealed section 177 of the *Law of Property Act, 1925*[56] and amended the *Wills Act, 1837*[57] to provide:

> 18(1) Subject to subsections (2) to (4) below, a will shall be revoked by the testator's marriage.
>
> (2) A disposition in a will in exercise of a power of appointment shall take effect notwithstanding the testator's subsequent marriage unless the property so appointed would in default of appointment pass to his personal representatives.
>
> (3) Where it appears from a will that at the time it was made the testator was expecting to be married to a particular person and that he intended that the will should not be revoked by the marriage, the will shall not be revoked by his marriage to that person.
>
> (4) Where it appears from a will that at the time it was made the testator was expecting to be married to a particular person and that he intended that a disposition in the will should not be revoked by his marriage to that person,
> (a) that disposition shall take effect notwithstanding the marriage; and
> (b) any other disposition in the will shall take effect also, unless it appears from the will that the testator intended the disposition to be revoked by the marriage.

These provisions require a more specific contemplation than that previously required by section 177, although they still do not require anything more than that the contemplation "appear" from the will. The Commission is not persuaded that it is either desirable or necessary to require the testator to refer to a contemplated marriage to a *particular* person in order for the will to survive marriage.

In its 1981 report, the Law Reform Commission of British Columbia stated that the

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[51] *In the Estate of Langston*, [1953] P. 100; see also, *Re Chase*, [1951] V.L.R. 477.

[52] *In re Knight* (1944) unreported, referred to in *In the Estate of Langston*, *supra* n. 51, at 103.

[53] *In re Natusch, Petit* v. *Natusch*, [1963] N.Z.L.R. 273 (S.C.).

[54] The Court, in *Pilot* v. *Gainfort*, [1931] P. 103, went so far as to approve of "my wife", although that decision has been criticized – perhaps somewhat unfairly.

[55] LRC(UK), *supra* n. 44, at 27.

[56] *Law of Property, 1925* (U.K.), 1925,15 & 16 Geo. 5, c. 20, s. 177, repealed by the *Administration of Justice Act 1982* (U.K.), 1982, c. 53, s. 75, Sch. 9, Pt. 1.

[57] *Wills Act, 1837* (U.K.), 1 Vict., c. 26, s. 18.

tentative preference of a majority of its members favoured modifying the legislation "so as to validate a will made in contemplation of a marriage generally provided the testator's intent can be gathered from the whole of the will."[58] In our opinion, a provision that merely requires an expression of contemplation of marriage on the testator's part is bound to result in the thoughtless "boiler-plating" of such a clause into all wills, creating the very real possibility that the actual intentions of some testators will inadvertently be thwarted.

We take the view that a testator ought to be able to avoid the automatic revocation of his or her will upon marriage provided it is apparent that the will was made in contemplation of a marriage. The more fundamental issue is, in our opinion, whether the contemplation of a marriage needs to be declared or expressed in the will itself. Currently, there is confusion about the admissibility of extrinsic evidence.[59] It has been suggested that to permit the admission of extrinsic evidence would "result in undesirable uncertainty and be a virtual invitation to litigation, particularly in the case of small estates, the bulk of which might then be dissipated in costs."[60]

Similar arguments were raised when the merits of a broad dispensation power respecting the formalities of execution, i.e., section 23 of *The Wills Act* were debated. The forecast flood of litigation did not materialize in respect of the dispensation power, and the Commission is not persuaded that it will materialize if the court is allowed to consider extrinsic evidence to discern whether a will was made in contemplation of a marriage. In a recent report, the Alberta Law Reform Institute reached a similar conclusion and recommended that:[61]

> ... if the Court is satisfied by clear and convincing evidence that a will was made in contemplation of a marriage, the will is not revoked by the marriage.

The Commission shares the view of the Alberta Law Reform Institute insofar as its proposed provision contemplates the admissibility of extrinsic evidence which, presumably, would include direct evidence of the testator's intentions, such as instructions given to the drafter, to determine whether a will was made in contemplation of a marriage. However, the Commission does not support what it perceives as the anomalous requirement for "clear and convincing evidence" that the will was made in contemplation of marriage. The wording suggests a higher standard of proof than the normal civil standard of proof, which the Commission does not believe is warranted.

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[58]BCLRC, *supra* n. 9, at 73.

[59]*Re Pluto*, *supra* n. 48; *Ratzlaff Estate*, *supra* n. 49.

[60]LRC(UK), *supra* n. 44, at 15.

[61]ALRI, *supra* n. 30, at 46.

RECOMMENDATION 14

The Act should provide that a will is not revoked by the marriage of the testator where it appears from the will, or from extrinsic evidence, that the will was made in contemplation of the marriage.

2. Particular Gifts

A second noteworthy problem with clause 17(a) concerns particular gifts in contemplation of marriage. According to that clause, a will must be made in contemplation of marriage in order to avoid the automatic revocation of the entire will.[62] This means that, even if it were clear from the terms of a will that a particular bequest was being made in contemplation of marriage, unless the will included a declaration that the entire will was being made in contemplation of marriage, the will would be automatically revoked. This requirement was changed in the United Kingdom when the 1982 amendments to the *Wills Act, 1837* were introduced,[63] following the recommendation of the Law Reform Committee. That Committee stated:

> Once it is accepted that a bequest in a will is made in "contemplation of marriage" i.e. with the intention that it should survive the marriage, it seems illogical to suppose that the testator did not intend the will to survive the marriage; for the bequest cannot survive unless the will survives.[64]

The Commission concurs with this reasoning and recommends that clause 17(a) likewise be amended to refer not only to a will, but part of a will, made in contemplation of marriage.

RECOMMENDATION 15

The Act should provide that a will is not revoked by the marriage of the testator where either the will or a part of the will was made in contemplation of the marriage.

E. OBLITERATION, CANCELLATION, INTERLINEATION

Prior to the enactment of the *Wills Act, 1837*, section 6 of *The Statute of Frauds, 1677*[65] provided:

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[62] *Re Coleman*, [1975] 1 All E.R. 675 (Ch. D.). See also *Re Pluto*, *supra* n. 48.

[63] *Administration of Justice Act 1982* (U.K.), 1982, c. 53.

[64] LRC(UK), *supra* n. 44, at 16.

[65] *The Statute of Frauds, 1677* (U.K.), 29 Car. II, c. 3.

> And moreover, no devise ... shall ... be revocable, otherwise than by some other will or codicil in writing, or other writing declaring the same, or by burning, cancelling, tearing or obliterating the same by the testator ....

In drafting the *Wills Act, 1837*, the English Legislature rejected a recommendation that section 6 of the *Statute of Frauds* be incorporated into the new Act.[66] Instead, section 20 of the Act provides as follows:

> No will or codicil, or any part thereof, shall be revoked otherwise than as aforesaid, or by another will or codicil executed in manner herein-before required, or by some writing declaring an intention to revoke the same and executed in the manner in which a will is herein-before required to be executed, or by the burning, tearing, or otherwise destroying the same by the testator, or by some person in his presence and by his direction, with the intention of revoking the same.[67]

Clauses 16(b), (c) and (d) of the Manitoba Act are essentially the same as section 20 of the *Wills Act, 1837*:

> **Revocation in general**
> **16** A will or part of a will is not revoked except as provided in subsection 8(2) or
> ...
> (b) by a later will valid under this Act, or
> (c) by a later writing declaring an intention to revoke it and made in accordance with the provisions of this Act governing the making of a will; or
> (d) by burning, tearing or otherwise destroying it ....

Notably, clause 16(d) of Manitoba's Act and section 20 of the *Wills Act, 1837* both permit revocation by "burning, tearing, or otherwise destroying" the will, whereas the original provision in *The Statute of Frauds, 1677* allowed for revocation by "burning, cancelling, tearing or obliterating".

According to clause 16(d) therefore, merely writing "cancelled" or "revoked" or drawing a line or an "X" though a will or part of a will no longer automatically revokes the will. Such acts may be revocatory if executed, pursuant to clause 16(c), although at least one court has held them to be governed by section 19.[68] Subsections 19(1) and (2) provide as follows:

> **Making alterations**
> **19(1)** Subject to subsection (2), unless an alteration that is made in a will after the will has been made is made in accordance with the provisions of this Act governing the making of a will, the alteration has no effect except to invalidate words or meanings that it renders no longer apparent.

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[66] See, *Stephens* v. *Taprell* (1840), 163 E.R. 473 at 475.

[67] *Wills Act, 1837* (U.K.), 1 Vict., c. 26, s. 20.

[68] *Re Comerford's Estate* (1980), 8 Man. R. (2d) 1 (Surr. Ct.).

Execution of alterations

19(2) An alteration that is made in a will after the will has been made is validly made when the signature of the testator and subscription of witnesses to the signature of the testator to the alteration, or, in the case of a will that was made under section 5 or 6, the signature of the testator, are or is made,

(a) in the margin or in some other part of the will opposite or near to the alteration; or

(b) at the foot or end of, or opposite to, a memorandum referring to the alteration and written in some part of the will.

Like section 20 of the *Wills Act, 1837*, clause 16(d) of Manitoba's Act no longer permits revocation by obliteration, a common means of attempted revocation. Unless an obliteration actually "destroys" the will (or a part thereof), which will seldom be the case, it will not be revocatory pursuant to clause 16(d), as that clause only recognizes revocation by "burning, tearing, or otherwise destroying". Most obliterations, such as those effected by pen or pencil, or by pasting or taping a piece of paper over a part of the will, are not actually destructive. Currently then, revocation by obliteration may be practically impossible, except pursuant to subsection 19(1).

This is not the case under the *Wills Act, 1837*. While obliterating was not included as a means of revocation under section 20 of that Act, it was continued in section 21, as follows:

> No obliteration, interlineation, or other alteration made in any will after the execution thereof shall be valid or have any effect, except so far as the words or effect of the will before such alteration shall not be apparent, unless such alteration shall be executed in like manner as herein-before is required for the execution of the will; but the will, with such alteration as part hereof, shall be deemed to be duly executed if the signature of the testator and the subscription of the witnesses be made in the margin or on some other part of the will opposite or near to such alteration, or at the foot or end of or opposite to a memorandum referring to such alteration, and written at the end or some other part of the will.[69]

While the *Wills Act, 1837* continues to permit obliteration as an effective discrete act of revocation, under subsection 19(1) of Manitoba's Act, obliteration is only revocatory if it was done in an invalid attempt to alter a part of a will by interlineation,[70] in which case the obliteration is effective insofar as it renders "... words or meanings ... no longer apparent". There are thus two different rules for revocation by obliteration: one requiring actual destruction (pursuant to clause 16(d)) and the other simply requiring the obliteration to render words or meanings no longer apparent (pursuant to subsection 19(1)).

Section 19 of the Act raises other issues. First, it only concerns alterations by interlineation, as opposed to alterations by codicil. That is to say, its applicability is limited to

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[69] *Wills Act, 1837* (U.K.), 1 Vict., c. 26, s. 21.

[70] See discussion of this point below.

alterations made in the text of the will; it does not govern alterations made wholly in the margin,[71] on the back of a page, underneath the signature, on a separate piece of paper, or in a conventional codicil. This is evident by the use of the preposition "in", as opposed to "to" in the phrase "... unless an alteration that is made in a will ...." In the Commission's opinion, subsection 19(1) would be more instructive if it clarified that it only concerns alterations made by interlineation.

Secondly, pursuant to subsection 19(2), it is the form of the will or codicil, and not the form of the alteration, that determines how the alteration must be executed. If the alteration is to a non-holograph will, it must be signed by both the testator and witnesses; if the alteration is to a holograph will, the testator's signature is all that is required. In the Commission's opinion, basing the execution requirements on the form of will makes little sense, as it renders an alteration of a non-holograph will in the testator's handwriting invalid if it is executed by only the testator and, conversely, a typewritten alteration of a holograph will is valid even if it is only executed by the testator.

The Act permits the making of holograph wills and codicils, signed by only the testator without any witnesses. One of the reasons for not requiring witnesses to holograph wills is that the requirement that the will be in the testator's handwriting is regarded as a sufficient safeguard against fraud. Why then require witnesses for interlineation in non-holograph wills handwritten by the testator? Conversely, not requiring witnesses to a typewritten interlineation of a holograph will or codicil (albeit an uncommon form of interlineation to such documents) is, given the potential for fraud, difficult to defend. As well, the requirement for witnesses to interlineation handwritten by the testator to non-holograph wills and codicils may be tantamount to laying a trap for lay persons who know about holograph wills and naturally extend that knowledge to handwritten interlineation of non-holograph wills and codicils. (While it is true that such interlineation can be validated pursuant to section 23 of the Act, that process is time-consuming and imposes an unnecessary cost on the estate.)

Several of the provinces and territories have legislation similar to section 21 of the *Wills Act, 1837*,[72] including Saskatchewan's Act, which provides:[73]

> 11(1) No obliteration, interlineation, cancellation by drawing lines across a will or any part of a will, or other alteration made in a will after execution is valid or has any effect except to the extent that the words or effect of the will before the alteration are not apparent unless the alteration is executed in accordance with this Act.
>
> (2) The will with the alteration as part of it is properly executed if the signature of the testator

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[71] *Re McLeod* (1965), 47 D.L.R. (2d) 370 (Alta. S.C.).

[72] *Wills Act*, R.S.N.S. 1989, c. 505, s. 20; *Probate Act*, R.S.P.E.I. 1988, c. -21, s. 73; *Wills Act*, R.S.N. 1990, c. W-10, s. 12; *Wills Act*, R.S.N.W.T. 1988, c. W-5, s. 12; *Wills Act*, R.S.Y. 1990, c. 179, s. 11; *The Wills Act, 1996*, S.S. 1996, s. W-14.1, s. 11.

[73] *The Wills Act, 1996*, S.S. 1996, c. W-14.1, s. 11. Indeed, *The Wills Act* of Manitoba, from its original enactment until its 1964 re-enactment, contained such a section: see R.S.M. 1954, c. 293, s. 17.

and the subscription of the witnesses are made:

(a) in the margin or in some part of the will opposite or near to the alteration; or

(b) at the foot or end of or opposite to a memorandum referring to the alteration and written at the end or in some other of the will.

(3) A will may be altered by a testator without any requirement as to the presence of or attestation or signature by a witness or any further formality if the alteration is wholly in the handwriting of, and signed by, the testator.

We believe that the Saskatchewan provision, with some amendments, would address all of the foregoing issues and concerns and would therefore recommend the inclusion of similar provisions in Manitoba's *Wills Act*.

RECOMMENDATION 16

The Act should provide that no obliteration, interlineation, cancellation by the writing of words of cancellation or by drawing lines across a will, or any part of a will, made after execution of a will, is valid or has any effect except to the extent that the words or effect of the will before the alteration are not apparent unless the alteration is executed in accordance with this Act.

RECOMMENDATION 17

The Act should provide that the alteration is properly executed if the signature of the testator and the subscription of the witnesses are made:

(a) in the margin or in some part of the will opposite or near to the alteration; or

(b) at the foot or end of or opposite to a memorandum referring to the alteration and written at the end or in some other part of the will.

RECOMMENDATION 18

The Act should provide that a will may be obliterated, interlineated, or cancelled by the writing of words of cancellation or by drawing lines across a will or any part of a will by a testator without any requirement as to the presence of or attestation or signature by a witness or any further formality if the alteration is wholly in the handwriting of, and signed by, the testator.

F. EFFECT OF DIVORCE

The revocatory effect of divorce on an existing will has been the subject of several law

reform reports,[74] including the Commission's discussion of the topic in its report *Family Law - Part I: The Support Obligation*.[75] As a result of the recommendations contained in that Report, section 36.1 was enacted in 1977[76] which was replaced in 1980 by current subsection 18(2).[77] Subsections 18(2) and 18(3) provide:

> **Effect of divorce**
> **18(2)** Where in a will
> (a) a devise or bequest of a beneficial interest in property is made to a spouse of the testator; or
> (b) the spouse of the testator is appointed executor or trustee, or
> (c) a general or special power of appointment is conferred upon a spouse of the testator;
> and after the making of the will and before the death of the testator, the testator's marriage to that spouse is terminated by a decree absolute of divorce or is found to be void or declared a nullity by a court in a proceeding to which the testator is a party, then, unless a contrary intention appears in the will, the devise, bequest, appointment or power is revoked and the will shall be construed as if the spouse had predeceased the testator.
>
> **Definition of "spouse"**
> **18(3)** In subsection (2) "spouse" includes the person purported or thought by the testator to be the spouse of the testator.

Though subsection 18(2) differs from the provision that was introduced in response to the Commission's recommendation in several respects, the most significant in this context is that, while the original provision only deemed a spouse to have predeceased the testator, subsection 18(2) goes further and revokes any devises, bequests, appointments, and powers.

In 1977, the Ontario Law Reform Commission reviewed five reform proposals, including the revocation of gifts to an ex-spouse, and deeming an ex-spouse to have predeceased the testator.[78] Although that Commission recommended only the latter proposal, both proposals were included in subsection 17(2) of *The Succession Law Reform Act, 1977*.[79] That subsection is essentially identical to current subsection 18(2) of the Manitoba Act.

Similarly, the Uniform Law Conference of Canada concluded that deeming a predeceasing

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[74]For a list of reports, see, Alberta Law Reform Institute, *Effect of Divorce on Wills* (Report #72, 1994) v [ALRI].

[75]Manitoba Law Reform Commission, *Family Law - Part I: The Support Obligation* (Report #23, 1976) 106-108 [MLRC].

[76]*An Act to Amend Various Acts Relating to Marital Property*, S.M. 1977, c. 53, s. 7.

[77]*An Act to Amend The Wills Act and The Mental Health Act*, S.M. 1980, c. 7, s. 2.

[78]Ontario Law Reform Commission, *The Impact of Divorce on Existing Wills* (Report, 1977) [OLRC].

[79]Now *The Succession Law Reform Act*, R.S.O. 1990, c. S-26, s. 17(2).

is the better reform,[80] but its draft legislation revoked gifts to *and* deemed a predeceasing of the ex-spouse.

In its Report *Effect of Divorce on Wills*, the Alberta Law Reform Institute recommended a provision similar to Manitoba subsection 18(2), but which only deems predeceasing of the ex-spouse.[81] The Institute alluded to the possible confusion that may result from legislation that both revokes gifts to and deems a predeceasing of an ex-spouse.[82] Specifically, where the will provides for a gift to a spouse with a gift-over in the event that the spouse predeceases the testator, it is not clear whether only the initial gift is revoked by the legislation, or whether both it and the gift-over are revoked.

Subsection 18(2) is likewise potentially confusing. An obvious solution would be the repeal of the provision revoking all devises, bequests, appointment, and powers. Alternatively, the provision could be amended to read: "... the devise, bequest, appointment or power, *but not a gift-over*, is revoked and the will shall be construed as if the spouse had predeceased the testator" [emphasis added]. Of these two solutions, the Commission favours the former as the one that is more straightforward and more likely to resolve the problem.

RECOMMENDATION 19

The Act should provide that, after the making of a will by a testator and before his or her death, the marriage of the testator is terminated by a divorce judgment or the marriage is found to be void or declared a nullity by a court in a proceeding to which he or she is a party, then, unless a contrary intention appears in the will, the will shall be construed as if the spouse had predeceased the testator.

Subsection 18(2) gives rise to several other matters worthy of consideration. First, it does not deal with the (admittedly rare) situation where the will gives a life estate *pur autre vie* (one which terminates on the death of someone other than the beneficiary) with the spouse as the *cestui que vie* (person on whose death the life estate will terminate). The Law Reform Commission of British Columbia briefly considered and rejected the idea of including life estates *pur autre vie* as it considered that a testator might not want such a life estate to be defeated.[83] We take a different view, believing it more likely that, in such circumstances, a testator would wish to revoke the life

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[80]Uniform Law Conference of Canada, "Wills: The Impact of Divorce on Existing Wills", *Proceedings of the Sixtieth Annual Meeting* (1978), at 35, and Appendix S, at 269-282. *The Uniform Wills Act* was originally adopted by the Conference of Commissioners on Uniformity of Legislation in Canada (as the ULCC was formerly called) in 1929 [ULCC].

[81]ALRI, *supra* n. 74.

[82]ALRI, *supra* n. 74, at 23.

[83]Law Reform Commission of British Columbia, *Statutory Succession Rights* (Report #70, 1983) 110 [BCLRC].

estate and think it would be useful if the legislation addressed this issue.

RECOMMENDATION 20

The Act should stipulate that a life estate* pur autre vie *with a spouse as a* cestui que vie *will not survive the termination of a marriage, unless a contrary intention appears in the will.

Second, subsection 18(2) does not deal with the more common life insurance and pension proceeds beneficiary designations made in wills. Regarding life insurance beneficiary designations, at one time *The Insurance Act*[84] contained a provision similar to subsection 18(2), but that provision was repealed many years ago.[85] Presently, the only potentially relevant provision in *The Insurance Act* on this point is subsection 169(3),[86] which provides:

> **Revocation**
> **169(3)** Where a designation is contained in a will, if subsequently the will is revoked by operation of law or otherwise, the designation is thereby revoked.

Subsection 18(2), however, does not revoke a will, meaning that subsection 169(3) of *The Insurance Act* is inapplicable, and an insurance proceeds designation does not otherwise appear to fall within clause 18(2)(a), and certainly not (b) or (c). Thus, a life insurance beneficiary designation contained in a will in favour of a spouse will, in fact, survive a divorce.

As for the impact of divorce on beneficiary designations made in a will with respect to pension proceeds, there is no relevant legislation whatsoever.

It seems to the Commission that the legislation is remiss in not addressing the consequences of divorce on these kinds of beneficiary designations made in wills, and further, that it would be appropriate to treat such designations in favour of a spouse in the same manner as other bequests on divorce.

RECOMMENDATION 21

The Act should treat beneficiary designations in favour of a spouse, whether designations of insurance proceeds or pension proceeds, in the same manner as other devises or bequests.

Subsection 18(2) also fails to provide for the possibility of divorced spouses subsequently

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[84] *An Act to Amend the Insurance Act*, R.S.M. 1954, c. 126, s. 176.

[85] *An Act to Amend the Insurance Act*, S.M. 1960, c. 27, s. 3.

[86] *The Insurance Act*, C.C.S.M. c. I40.

remarrying each other. A precedent for such a provision exists in the United States, specifically in section 2-508 of the *Uniform Probate Code*, which states:

> ... If provisions are revoked solely by this section, they are revived by testator's remarriage to the former spouse ....

The Commission believes that a similar provision would be useful in preventing unnecessary disruption of testamentary preparations in the event of a reconciliation by divorced partners.

RECOMMENDATION 22

The provisions of the Act dealing with revocation of a will upon marriage should not apply in the event of a subsequent marriage to the former spouse.

Finally, subsection 18(2) refers to a "decree absolute" of divorce. As decrees *nisi* and absolute are no longer issued in Manitoba,[87] the legislation should be updated to refer simply to "a divorce".

RECOMMENDATION 23

References to "a decree absolute of divorce" should be replaced with a reference to "a divorce judgment".

G. REVIVAL

Section 20 of the Act deals with the revival of a will. The opening statement provides, in part:

> **Revival**
> 20(1) A will or part of a will that has been in any manner revoked is revived only ....

Although the words "in any manner revoked" suggest that the section contemplates the revival of any revoked will, regardless of the manner of revocation, the courts have held that subsection 20(1) does *not* apply to a will that has been revoked by destruction:

> ... it has been decided by no less than three very remarkable cases, that if the codicil refer to a will with the intention of reviving it, and it turn out that such a will has been entirely burnt or destroyed by the testator animo revocandi, the codicil cannot effect its revival.
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> ....

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[87] *Divorce Act*, R.S.C. 1985, c. 3 (2nd Supp.), s. 8.

> Assuming, then, upon these authorities, that a codicil may, by referring in adequate terms to a revoked will, revive that will *if it be in existence*....[88]

The rationale for this decision is based on the requirement of writing; if a will has been destroyed, there is no writing in existence that can again become a will.[89] That reasoning may have been understandable in the 19th century when copies of wills may have been rare, but it is far less compelling today when there will often (perhaps usually) be writing of one sort or another in existence.[90]

It is also worth noting that the case law on this point is at odds with the common law relating to missing wills, which allows such wills to be reconstructed from whatever evidence is available, including oral or affidavit evidence of someone who simply saw the will.[91]

The Commission is of the opinion that the case law is anachronistic, insofar as it does not allow for the revival of a will that has been revoked by destruction. Accordingly, it believes that subsection 20(1) of the Act should be amended to explicitly permit the revival of a will that has been revoked through destruction.

RECOMMENDATION 24

The Act should explicitly permit the revival of wills that have been revoked by destruction if copies or adequate evidence is available to the court to reconstruct the will.

H. ADEMPTION

Under the common law, if the subject matter of a specific bequest or devise is no longer an asset of the testator's estate,[92] the gift "is adeemed", i.e. fails.[93] Where property has been disposed of, but the transaction has not yet been completed so that the proceeds of disposition

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[88] *In the Goods of Steele* (1868), L.R. 1 P. & D. 575 at 576-577. [emphasis added]

[89] *Rogers and Andrews* v. *Goodenough* (1862), 164 E.R. 1028 at 1031.

[90] Examples of such writing include a copy of the will itself, copies of instructions given to the person who drafted the will, or copies of notes taken by the drafter.

[91] *Feeney's Canadian Law of Wills* (4th ed., 2000), paras. 5.67-5.68.

[92] This can happen where the testator has sold or given the property away, or otherwise converted it into some different form of property, or where it has been destroyed.

[93] Feeney, *supra* n. 91, at para. 15.1.

remain payable at the testator's death, the disposition is treated like an ademption.[94]

Sections 21 and 24 of the Act deal with the question of ademption:

> **Subsequent conveyance**
> **21** A conveyance of, or other act relating to, real or personal property disposed of in a will made or done after the making of a will, does not prevent operation of the will with respect to any estate or interest in the property that the testator had power to dispose of by will at the time of the death of the testator.
>
> **Property disposed of by committee or substitute decision maker**
> **24(1)** Where the committee for a person, or the substitute decision maker for property for a person appointed under *The Vulnerable Persons Living with a Mental Disability Act* sells, mortgages, exchanges or otherwise disposes of any property, real or personal, of the person, the devisees, legatees and heirs of that person have, on his death, the same interest and rights in the proceeds of the sale, mortgage, exchange or disposition by the committee as they would have had in the property if it had not been sold, mortgaged, exchanged or disposed of and the proceeds, or any balance thereof, shall be deemed to be of the same nature and character as the property sold, mortgaged, exchanged or disposed of.
>
> **Application to Public Trustee**
> **24(2)** Subsection (1) applies where the Public Trustee acts as committee for a person or as substitute decision maker for property for a person.

Section 21 will apply, for example, to a devise of a fee simple estate in a parcel of land which the testator subsequently leases or mortgages, or in which the testator grants a life estate that is extant at his or her death, i.e., the devise will still be effective to transfer the fee simple estate, subject to the lease, mortgage, or life estate.

The legislation in Ontario (and, to a lesser extent that of Alberta, Saskatchewan, New Brunswick, the Northwest Territories and Nunavut)[95] goes further than section 21 and prevents ademption in the following situations:[96]

(a) when the testator makes an agreement to sell the devised parcel and dies before the agreement is fully implemented;
(b) when the testator has sold a parcel of land or chattel that was specifically gifted and taken a mortgage back;
(c) when specific gift assets have been insured and are destroyed before (or at the same time) as the testator's death;

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[94] This is the law of ademption by equitable (notional) conversion: Feeney, *supra* n. 91, at para. 15.34.

[95] *Succession Law Reform Act*, R.S.O. 1990, c. S-26, s. 20(2). See also *Wills Act*, R.S.A. 2000, c. W-12, s. 21(2); *The Wills Act, 1996*, S.S. 1996, c. W-14.1, s. 26(2); *Wills Act*, R.S.N.B. 1973, c. W-9, s. 20(2); *Wills Act*, R.S.N.W.T. 1988, c. W-5, s. 14(2) (Northwest Territories and Nunavut).

[96] In each of these situations, the gift fails in accordance with the common law of ademption or by equitable conversion.

(d) when the land comprising a specific devise is expropriated and the compensation payable has not yet been determined.

In its 1989 Report, the Law Reform Commission of British Columbia considered ademption, equitable conversion and the reform legislation of Alberta, Saskatchewan, Ontario, New Brunswick and the Northwest Territories. The Commission concluded that the reform legislation, limited as it is to abolishing equitable conversion, does not ameliorate the law of ademption respecting entitlement to proceeds of disposition received by the testator, and stated:

> ... that the current law of ademption is based on two presumptions:
>
> 1. A testator who makes a specific gift does not intend to confer a general economic benefit on the beneficiary; and
>
> 2. A testator intends to revoke the gift if the subject matter of the gift is disposed of before his death.
>
> ....
>
> Although the two presumptions that shape the current law of ademption appear to be sound ones, it seems to us that their application should depend in every case on the testator's intention. That intention, however, should be determined only after an inquiry into the surrounding circumstances and should not be inferred solely from the fact that the language used to describe a gift would cause it to be characterized as specific, or that a disposition has occurred. Such an inquiry would require a two stage deliberation: do the circumstances surrounding the making of the testamentary gift evidence an intention to confer a general economic benefit; and, if so, do the circumstances surrounding the disposition of the gift support an intention to revoke it?[97]

The British Columbia Commission also considered the approach adopted in the state of Kentucky, where ademption has been legislatively abolished and a beneficiary is entitled to the economic equivalence of a gift if the proceeds of disposition are not traceable. They rejected Kentucky's approach, concluding that "payment of the economic equivalent may compromise gifts to other beneficiaries," which, in turn, would require speculation as to which beneficiary the testator would have intended to bear the loss.[98] Instead, it recommended a wide-ranging revision of section 19 (identical to Manitoba's section 21) which would provide that a beneficiary be entitled to the proceeds of disposition if it could be shown that the testator (a) wanted to confer a general economic benefit on the beneficiary and (b) did not dispose of the property in order to revoke the gift. The recommendation also described, in some detail, the considerations and evidence which should be relied upon to ascertain the testator's intention.

We do not agree with the British Columbia Commission's recommendation as it would, in our opinion, require the court to speculate on what was in the testator's mind when he or she

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[97] Law Reform Commission of British Columbia, *Wills and Changed Circumstances* (Report #102, 1989) 15-16 [BCLRC].

[98] *Id.*, at 13.

disposed of the property and may, in some cases, lead to a "re-writing" of the testator's will. Rather than such a broad and general approach, the Commission prefers the more conservative approach taken by Ontario where ademption is prevented in certain specific situations, as noted above.

RECOMMENDATION 25

The Act should provide that, except when a contrary intention appears by the will, where a testator (or his or her estate) before, at the time of, or after his or her death

(a) made an agreement to dispose of specifically gifted property but the agreement was not fully implemented at the time of death;

(b) sold specifically gifted property and has taken back a mortgage, charge or other security;

(c) has a right to receive insurance proceeds covering loss of or damage to specifically gifted property;

(d) has a right to receive compensation for the expropriation of specifically gifted property;

the devisee or donee of that property is entitled to the proceeds of disposition, mortgage, charge or security interest, insurance proceeds or compensation.

The wills legislation in New Brunswick, Northwest Territories and Nunavut[99] goes even further and, in certain circumstances, will allow a beneficiary to trace the proceeds of sale of a gift even where those proceeds were received by the testator before death and commingled with other assets. The relevant provision is derived from subsection 20(3) of the *Uniform Wills Act*,[100] which provides as follows:

> 20(3) Except when a contrary intention appears by the will, where the testator has bequeathed proceeds of sale of property and the proceeds are received by him before his death, the bequest is not adeemed by commingling the proceeds with the funds of the testator if the proceeds are traced into those funds.

There are two key requirements for the operation of this provision: (1) the will must include a bequest of the proceeds; and (2) it must be possible to trace those proceeds.

Interestingly, Manitoba included an identical provision (subsection 22(2)) in a new *Wills*

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[99] *Wills Act*, R.S.N.B. 1973, c. W-9, s. 20(3); *Wills Act*, R.S.N.W.T. 1988, c. W-5, s. 14(3) (Northwest Territories and Nunavut).

[100] Uniform Law Conference of Canada, *Uniform Wills Act*.

Act enacted in 1964.[101] However, while the majority of the Act came into force upon royal assent, section 50 of the Act specifically provided that section 22 would not come into force until a date set by proclamation. Section 22 never was proclaimed and thus was never actually in force. It was repealed in 1967.[102]

According to *Hansard*, the government's Law Reform Committee recommended that section 22 be included in the new Act but "held back" pending further research and review to determine whether it would be useful.[103] Ultimately, the committee recommended its repeal although the reasons for the recommendation are not identified in *Hansard*.

New Brunswick, Northwest Territories and Nunavut appear to be the only other provinces which have enacted this provision. The Ontario Law Reform Commission declined to recommend such a provision on the basis that:

1. The commingling might be looked upon as a change of intention on the part of the testator.
2. There might be difficulty in deciding what rules should be applied if the testator had withdrawn money from the combined fund.[104]

The Law Reform Commission of British Columbia did not agree with the Ontario Commission, arguing that commingling was not necessarily an indication of an intention to revoke a gift and that tracing rules are well developed. Although the British Columbia Commission supported such legislation, it has not been adopted in that province to date.[105]

The Commission agrees with the British Columbia Commission and is of the opinion that such a provision should be included in *The Wills Act*. The application of such a provision would be limited to a very narrow fact situation - one in which the testator clearly intended a gift of the proceeds of an asset (in addition to or in lieu of the asset itself) and where the proceeds may be traced according to the established rules. While the common law may even be moving in this direction,[106] the Commission is of the opinion that legislation is the simplest and most certain way to address the problem.

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[101] *The Wills Act*, S.M. 1964, c. 57 (hereinafter referred to as the Wills Act 1964), s. 22(2). This statute was modeled on the *Uniform Wills Act*.

[102] *The Statute Law Amendment and Statute Law Revision Act, 1967*, S.M. 1966-1967, c. 59, s. 98.

[103] Manitoba, Legislative Assembly, *Debates and Proceedings*, vol. 13, no.141, at 3362 (4 May 1967).

[104] Ontario Law Reform Commission, *The Proposed Adoption in Ontario of the Uniform Wills Act* (1968) 36 [OLRC].

[105] BCLRC, *supra* n. 97, at 15.

[106] See *Nakonieczny* v. *Kaminski* [1989], 2 W.W.R. 738 (Sask. Q.B.).

RECOMMENDATION 26

The Act should provide that, except where a contrary intention appears by the will, where the testator has bequeathed proceeds of sale of property and the proceeds are received by the testator before his or her death, the bequest is not adeemed by commingling the proceeds where those proceeds can be traced.

Subsection 24(1) concerns the interest and rights in the proceeds of a disposition of property by a committee or substitute decision maker appointed under *The Vulnerable Persons Living with a Mental Disability Act*. *The Powers of Attorney Act*[107] provides for, *inter alia*, "enduring" powers of attorney, which powers remain effective regardless of the mental incapacity of the donor. This being the case, it would make sense for a reference to an attorney acting pursuant to an enduring power of attorney to be added to section 24 of the Act.

RECOMMENDATION 27

***The provision of the Act dealing with property disposed of by committee or substitute decision maker should include an attorney acting pursuant to an enduring power of attorney under* The Powers of Attorney Act.**

I. LAPSED AND VOID DEVISES AND BEQUESTS

Testamentary gifts may be either specific, demonstrative, general or residuary. Where a gift in a will fails for any reason, the gift is said to lapse and a new beneficiary must be found. The common law developed rules to determine who is entitled to receive lapsed gifts. At common law lapsed gifts, other than a residuary gift, of personal property go to the testamentary residuary beneficiary or beneficiaries and lapsed gifts, other than a residuary gift, of real property comprise an intestate residue and go to the heir or heirs of the testator pursuant to the governing intestate succession law. Lapsed residuary gifts of both real and personal property become an intestate residue and go to the heir or heirs of the testator pursuant to the governing intestate succession law.

Like many other common law jurisdictions, Manitoba has superseded the common law by enacting section 25. It provides:

> **Lapsed and void devises**
> **25.** ... except when a contrary intention appears by the will, real or personal property or an interest therein that is comprised, or intended to be comprised, in a devise or bequest that fails or becomes void by reason of the death of the devisee or donee in the lifetime of the testator, or by reason of the devise or bequest being contrary to law or otherwise incapable of taking effect, is included in the residuary devise or bequest, if any, contained, in the will.

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[107] *The Powers of Attorney Act*, C.C.S.M. c. P97, s. 10(1).

1. Specific Gifts

Section 25 of the Act essentially provides that (unless a contrary intention appears in the will), a gift that fails because it is incapable of taking effect falls into the residue of the estate. Such a situation occurs, for example, when the beneficiary predeceases the testator.

Section 25 will not apply where the testator names an alternate beneficiary in the event that the gift fails for a specific reason. A common example would be a gift of a cottage to A, with a provision that if she should predecease the testator (or die within thirty days of the testator), the cottage is to go to B. However, if the gift to A fails for another reason, such as A disclaiming the gift, then section 25 will apply and the gift will fall into the residue rather than to the alternate beneficiary. In the Commission's opinion, it is more likely that the testator intended the alternate beneficiary to receive the gift.

RECOMMENDATION 28

The Act should provide that, where a gift fails and the testator has designated an alternative beneficiary, the gift should be distributed to that alternative beneficiary, notwithstanding that it fails for a reason other than that contemplated by the testator.

2. Residuary Gifts

The majority of Canadian courts have decided that section 25 (or its equivalent in other provinces) does not apply to a residuary gift. In the leading case, *Re Stuart Estate*,[108] the Court concluded that, in the light of the common law, the section would have to state expressly that it applies to a lapsed residuary gift.

The Manitoba Court of Queen's Bench in *Pawlukevich (Paul) Estate* v. *Pawlukevich (Peter) Estate*[109] and *Cera Estate* v. *Wolfe*[110] took a different view, deciding that the share of the residuary gift of a predeceasing residuary beneficiary goes to the surviving residuary beneficiaries, and not into an intestate residue to the heir or heirs of the testator.

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[108] *Re Stuart Estate* (1964), 47 W.W.R. (NS) 500 at 504 (B.C.S.C.).

[109] *Pawlukevich (Paul) Estate* v. *Pawlukevich (Peter) Estate* (1986), 41 Man. R. (2d) 62 (Q.B.).

[110] *Cera Estate* v. *Wolfe* (1987), 46 Man. R. (2d) 117 (Q.B.).

In an informal report, dated May 16, 1994,[111] the Commission considered the *Pawlukevich* and *Cera* decisions and concluded that section 25 should be amended to supersede them by adding a subsection to section 25 expressly stating that it does not apply to a residuary gift. In that same year, the Court of Appeal of Manitoba in *Sparks Estate* v. *Wenham*[112] "corrected" the *Pawlukevich* and *Cera* decisions, bringing the law of Manitoba in line with the law elsewhere that the common law, and not section 25, applies to a lapsed residuary gift. We concur with this decision and reiterate our reasons for our earlier recommendation.

> We do not believe that we can or should divine the intentions of makers of wills.... If they have failed to express their wishes in the case of a lapsed residual gift, it is appropriate that the gift should go on a partial intestacy and be divided among the maker's next-of-kin. The other options involve rewriting the will. In one case, it changes the portion of the residue that each beneficiary would receive. In the other case, the gift is completely redirected to a person or persons not named in the will.
>
> Furthermore, it is significant to note that, if a maker left the entire residue to only one person and that person predeceased him or her, the result would be an intestacy and the residue would have to be divided among the maker's next-of-kin. Section 25 would not apply as there would be no surviving residual beneficiaries among whom to divide the lapsed portion. It seems appropriate that the same result is obtained where there is more than one residual beneficiary and one of them predeceases the maker.

For the sake of clarity the 1994 recommendation is restated here.

> ***RECOMMENDATION 29***
>
> ***Section 25 of the Act [new draft s. 23] should be renumbered subsection (1) and a new subsection (2) should be added, reading substantially as follows:***
>
> > ***Exception***
> > ***25(2) [new draft s. 23(2)] Subsection (1) does not apply to a residuary devise or bequest that fails or becomes void.***

J. GIFTS TO ISSUE AND SIBLINGS PREDECEASING TESTATOR

If a child, other issue (such as a grandchild), or brother or sister of a testator dies before the testator and leaves issue surviving the testator, and was to have received something under the testator's will, section 25.2 of the Act deems the gift to have been made to certain other specified persons instead:

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[111]Manitoba Law Reform Commission, *Lapsed Residual Gifts in Wills* (informal report #24B, 1994), reproduced in Appendix C of the *Twenty-fourth Annual Report 1994/95* (1995) 39.

[112]*Sparks Estate* v. *Wenham* (1994), 116 D.L.R. (4th) 308 (Man. C.A.).

When issue predecease testator

25.2 Except when a contrary intention appears by the will, where a person dies in the lifetime of a testator, either before or after the testator makes the will, and that person

(a) is a child or other issue or a brother or sister of the testator to whom, either as an individual or as a member of a class, is devised or bequeathed an estate or interest in real or personal property not determinable at or before the death of the child or other issue or the brother or sister, as the case may be; and

(b) leaves issue any of whom is living at the time of the death of the testator;

the devise or bequest does not lapse, but takes effect as if it had been made directly to the persons among whom, and in the shares in which, the estate of that person would have been divisible if that person had died intestate without leaving a spouse and without debts immediately after the death of the testator.

Incidentally, section 25.2 has been interpreted by all courts, including the Manitoba Court of Appeal, to apply to all kinds of testamentary gifts, including a residuary gift.[113]

It seems to us that section 25.2 could be improved in at least three respects. First, there is the question of when "the persons" to whom a lapsed gift is to go are to be ascertained: Is the relevant point in time the death of the (predeceased) beneficiary, or are the recipients of a lapsed gift to be determined as of the death of the testator?

A literal or plain meaning interpretation would suggest that "the persons" in section 25.2 refers to the persons among whom the estate would have been divided *as of the death of the testator*. However, this is not the interpretation that courts have placed on similar provisions in other jurisdictions. The leading Canadian case, *Re Branchflower*,[114] relied on English authority[115] to hold that the lapsed gift goes to the heirs of the predeceased beneficiary *as of the date of the death of that beneficiary*.

Although *Re Branchflower* and other similar decisions[116] are not binding in Manitoba, an older Manitoba case tends to support their reasoning. In *In Re Rake Estate*,[117] the provision in issue was the same as current section 25.2, except that it did not exclude a surviving spouse as a possible recipient of a gift to a beneficiary who predeceases the testator. The will divided the testator's estate equally among his nine children. One daughter predeceased the testator, leaving issue who survived the testator. That daughter's husband, Walter Brown, subsequently married

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[113]See, e.g., *Re Gillis Estate* (1988), 55 Man. R. (2d) 39 (C.A.).

[114]*Re Branchflower*, [1945] 4 D.L.R. 559 (Ont. H.C.).

[115]*In re Hurd; Stott* v. *Stott*, [1941] Ch. 196; approved in *Re Basioli; McGahey* v. *Depaoli*, [1953] Ch. 367. It is interesting to note that these decisions were superseded by a subsequent change in the UK legislation, which explicitly states that the relevant time is the death of the testator: *Wills Act, 1837* (U.K.), 1 Vict., c. 26, s. 33, as enacted by the *Administration of Justice Act 1982* (U.K), 1982, c. 53, s. 19.

[116]See, for example, *Re Basioli*, *supra* n. 115; *In re Hurd*, *supra* n. 115.

[117]*In re Rake Estate*, [1938] 1 W.W.R. 492 (Man. K.B.).

another of the testator's daughters, who also predeceased the testator, also leaving issue who survived the testator. The Court, without discussing the pertinent issue, decided that Walter Brown was entitled to a share (along with the surviving issue) of *each* daughter's share of the testator's estate.

The common law definition of a "widow" (or "widower") is someone whose spouse has died *and* who has not remarried. By that definition, Walter Brown was not the widower (or "surviving spouse") of *both* predeceased daughters at the time of the testator's death, meaning that, if that was the relevant time for determining entitlement, he would have been entitled to only one of the daughter's shares, i.e., his last wife's share. The Court, however, found that he was entitled to a share of *each* daughter's share of the estate, which conclusion it could only have reached by assuming that the relevant time for determining entitlement is the time of death of the predeceasing beneficiary.

The Commission is the opinion that the literal or plain meaning interpretation ought to be clarified, as it has been in the United Kingdom since 1982.[118]

RECOMMENDATION 30

The Act should provide that the relevant date for identifying beneficiaries is the date of the testator's death.

Section 25.2 applies only to gifts that fail as a result of the beneficiary having predeceased the testator. Gifts can fail for other reasons, including disclaimer, non-fulfillment of a condition, and being contrary to law. It is difficult to imagine that a testator would wish a gift to a predeceasing sibling, for example, to go to that sibling's issue, but that a gift to a sibling which fails for any other reason would become part of the residue of the estate.

RECOMMENDATION 31

Section 25.2 of the Act [new draft s. 25] should apply in any case where a gift to a child, other issue, or sibling of the testator fails, regardless of the reason.

Another problematic aspect of section 25.2 concerns the clause "where a person dies in the lifetime of the testator, either before or after the testator makes the will". Technically, this means that, if a testator has several children, one of whom is deceased (and survived by issue) at the time the testator makes a will providing a gift "to my children", the gift will include the issue of the predeceased child (assuming that they survived the testator).

Such a result is unlikely to reflect the testator's intentions, for surely when a testator refers

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[118] *Wills Act, 1837* (U.K.), 1 Vict., c. 26, s. 33, as enacted by the *Administration of Justice Act 1982* (U.K), 1982, c. 53, s. 19.

to his or her children in this context, the testator means living children. Though a court might be willing to infer a "contrary intention" and not apply section 25.2 if a testator made one provision for his children and another provision for the issue of a predeceased child, recently the courts have demonstrated a general unwillingness to infer a contrary intention.[119]

RECOMMENDATION 32

Section 25.2 of the Act [new draft s. 25] should be applicable only when the person dies* after *the testator makes the will.

K. SURVIVAL OF BENEFICIARIES

Very often a testator may wish to benefit a particular person by way of a testamentary gift, but not that person's heirs or beneficiaries. For this reason, many testators stipulate in their will that gifts are only to take effect if the beneficiary survives the testator by a specified period of time, normally 30 days. Section 2-702 of the *Uniform Probate Code* in the United States, as well as the wills legislation of Queensland and the Australian Capital Territory[120] require testamentary beneficiaries to survive the testator by 30 days, and the Victorian Law Reform Committee has recommended a similar provision.[121]

Manitoba's *Intestate Succession Act*[122] requires that, where a person dies intestate, anyone entitled to a distribution under the legislation must survive the deceased by 15 days, failing which the estate is distributed as if the beneficiary had, in fact, died first.

It seems to the Commission that the requirement for survival as regards intestate heirs would be equally valid in respect of testamentary beneficiaries, reserving always to the testator the right to make different arrangements in his or her will. This approach appears to be working in practice in other jurisdictions and, importantly, would likely accord with the wishes of the typical testator.

This raises the issue of the appropriate length of time by which the beneficiary must survive the testator. In 1994, the Queensland Law Reform Commission suggested that the relevant

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[119]See, for example, *Doucette* v. *Fedoruk Estate* (1992), 83 Man. R. (2d) 179 (C.A.); *Re Gillis Estate*, *supra* n. 113; and *Re McNeil's Estate* (1980), 25 Nfld. & P.E.I.R. 297 (Nfld. S.C. (T.D.)).

[120]*Succession Act 1981* (QLD), s. 32; *Wills Act 1968* (ACT), s. 31C.

[121]Victorian Law Reform Committee, *Reforming the Law of Wills* (Report, 1994), as cited in Queensland Law Reform Commission, *Uniform Succession Laws for Australian States and Territories: The Law of Wills* (Issues Paper #1, WP 46, 1994) 42 [QLRC].

[122]*The Intestate Succession Act*, C.C.S.M. c. I85, s. 6.

period of time ought to be 21 days, based upon information that in the one year period from September 1, 1992 to August 31, 1993, of 390 motor vehicle accident deaths in Queensland, 377 victims died instantly or within 7 days, and the remaining 13 victims died within 19 days.[123] As noted above, presently in Queensland, as well as in the United States and the Australian Capital Territory, a beneficiary must survive the testator by 30 days in order to benefit under the will. The Australian *Wills Bill 1997*[124] likewise imposes a 30 day survival condition.

Given that a 30 day time period currently appears in many of Manitoba's statutes, and that other jurisdictions have adopted a 30 day survival requirement (for compelling reasons, in the Commission's opinion), we are persuaded that the appropriate period of time is 30 days.

RECOMMENDATION 33

The Act should provide that, unless a contrary intention appears in the will, if a beneficiary fails to survive the testator by 30 days, any gifts to that beneficiary should be distributed as if the beneficiary had predeceased the testator.

L. MORTGAGED LAND

Section 36 of the Act provides, essentially, that a gift of land in a will carries with it liability for any mortgage debt to which the land is subject, unless, of course, the testator has indicated a contrary intention. At common law, gifts of *personal* property are not so encumbered; any debts associated with personal property are payable by the estate, in the absence of contrary directions from the testator.[125]

In our view, there is no longer any defensible reason (if ever there was one) to distinguish between real and personal property as regards encumbrances. Although the funds raised by mortgaging land are typically used for the purchase of that land, or for its improvement, it is also the case that personal property is often encumbered for the same or similar purposes (a car loan being a typical example). The rationale for making a devisee of land liable for the debts associated with that land therefore would appear to apply equally strongly to persons receiving gifts of personal property.[126]

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[123]QLRC, *supra* n. 121, at 43.

[124]QLRC, *supra* n. 19, Appendix 2, s. 34.

[125]At common law, an executor has an obligation to pay the debts of the estate: see, e.g. F.D. Baker, ed., *Widdifield on Executors' Accounts* (5th ed., 1967) 47, and J.H.G. Sunnucks, J.G. Ross Martyn and K.M. Garnett, eds., *Williams, Mortimer & Sunnucks on Executors, Administrators and Probate* (17th ed., 1993) 607. It follows that all assets, both real and personal, are charged with that obligation, except as provided by statute.

[126]For a more comprehensive discussion of this issue, see BCLRC, *supra* n. 97, at 58 *et seq.*

RECOMMENDATION 34

Section 36 of the Act [new draft s. 37] should apply to both real and personal property.

Section 36 is problematic in yet another respect: the definition of "mortgage" in subsection (4) is extremely broad, not limited to mortgages or charges related to acquisition or use of the property.

> **"Mortgage" defined**
> **36(4)** In this section "mortgage" includes an equitable mortgage, and any charge whatsoever, whether legal, equitable, statutory or of other nature, including a lien or claim upon freehold or leasehold property for unpaid purchase money, and "mortgage debt" has a meaning similarly extended.

Thus, by virtue of this definition, a devisee of land can be held responsible for debts that have absolutely nothing to do with the land itself. For example, "mortgage" is explicitly defined to include a lien, which can be attached to land to facilitate the collection of "debts" that are unrelated to the land and which otherwise one would naturally think would be debts to be satisfied by the estate.

This result is neither equitable nor reasonable, in our opinion. Accordingly, we recommend that the Act provide that the only debts that are not payable out of the testator's estate are those that are related to the acquisition, use, and improvement of the land (or chattel). This recommendation is very similar to the British Columbia Commission's recommendation regarding the comparable provision in that province's Act.[127]

RECOMMENDATION 35

The definition of "mortgage" in the Act should include only mortgages and charges related to the acquisition, use, or improvement of the particular land or chattel.

M. CONFLICT OF LAWS

Sections 39 through 47 of the Act set out the rules for determining which jurisdiction's laws apply to the making (specifically, the manner and formalities and intrinsic validity, but not capacity), revocation and construction of wills. It is not uncommon for such issues to arise when a testator moves from one jurisdiction to another after executing a will, or when a will disposes of property located in more than one jurisdiction.

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[127]BCLRC *supra* n. 97, at 63.

The rules reflect the principle of scission, providing different choice of law rules depending on whether the gift is a gift of an interest in movables or an interest in immovables. Most civil law system countries (unlike most common law jurisdictions) use a single choice of law rule for both movables and immovables, namely, either the law of the place of which the deceased is a national or in which the deceased is habitually resident, for both intestate and testate succession. The common law distinction may be a holdover from the time when different succession laws applied to personal and real property, when testaments were made to deal with personalty and wills were made to deal with realty.

The question as to which choice of law rules are appropriate in the context of intestacy is considered at length in Chapter 4 where we recommend a single set of rules for both movables and immovables. Most, if not all, of the common law academic commentators have advocated the adoption of a single choice of law rule for both movables and immovables, namely the deceased's personal law at death.[128] For the same reason, i.e. the fact that having two different rules no longer makes sense, the Commission believes that a single set of choice of law rules for testate succession is equally desirable. The Commission further suggests that Articles 3, 5-7 and 17 of the *1989 Hague Convention*[129] should serve as a model for the reform.

Prior to 1860, there was only one connecting factor for movables: the testator's domicile at death.[130] This meant that a will was effective to dispose of movables only if, at the time of its making, it complied with the law of the place where the testator was domiciled at death. By *Lord Kingsdown's Act*,[131] several factors were added to this single connecting factor, including, for example, the law of the place where the will was made. These alternative factors are presently found in subsection 42(1) of the Act. The Commission is of the opinion that the principle behind subsection 42(1), presumably to maximize the possibility of admitting a will to probate to fulfil the obvious intent of the testator to die testate, should also guide the reformed choice of law rules.

RECOMMENDATION 36

The Act should impose a single set of conflict of laws rules for both movables and immovables, modeled on Articles 3, 5-7 and 17 of the* Hague Convention *[as set out in Appendix B], and guided by the principle behind subsection 42(2) of

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[128]L. Collins, ed., *Dicey and Morris on the Conflict of Laws* (12th ed., vol. 2, 1993) 1024; J.H.C. Morris, *The Conflict of Laws* (2nd ed., 1980) 337; P. North and J.J. Fawcett, *Cheshire and North's Private International Law* (13th ed., 1999) 999; J.-G. Castel, *Canadian Conflict of Laws* (1st ed., vol. 2, 1977) 448; J.G. McLeod, *The Conflict of Laws* (1983) 414-415; V. Black, Annotation to *Thom Estate* v. *Thom*, (1987) 27 E.T.R. 185 (Man. Q.B.); V. Black, Annotation to *Manitoba (Public Trustee)* v. *Dukelow*, (1994) 4 E.T.R. (2d)1 at 2 (Ont. C.J. (G.D.)).

[129]See Appendix B.

[130]See, e.g, North and Fawcett, *supra* n. 128, at 987. "Connecting factor" describes a factor that the courts may use as a basis for deciding that a jurisdiction is so "connected" that its law should be applied.

[131]*Lord Kingsdown's Act*, 24 & 25 Vict., c. 114.

the current Act.

It is curious that the Act distinguishes between an "interest in movables" in section 42 and an "interest in land" in section 41 rather than an "interest in immovables". This inconsistent terminology also appears in section 13 of *The Dependants Relief Act*. In our view, the legislation would be clearer and more precise if consistent terminology were used, i.e., if it referred to an interest in "immovables" instead of "land". This same recommendation was made by the Law Reform Commission of British Columbia in 1981.[132]

RECOMMENDATION 37

If the Hague Convention is not adopted, the conflict of laws provisions in* The Wills Act *and* The Dependants Relief Act *should refer to an "interest in immovables" rather than an "interest in land".

On a further point of terminology, sections 41 and 42 refer to "the manner and formalities of making a will". The Commission is not aware of the rationale for distinguishing between "manner" and "formalities". Indeed, the distinction appears to be not only unwarranted but also potentially confusing. We believe that the legislation should speak in terms of "formal and intrinsic validity".

RECOMMENDATION 38

The conflict of laws provisions of the Act should refer to "formal and intrinsic validity" rather than "the manner and formalities of making a will".

As noted earlier, sections 41 and 42 deal with the formal and intrinsic validity of a will, but not with the testator's capacity to make a will. At common law, the choice of law rules for capacity are the *lex situs*[133] for immovables and, for movables, the testator's *lex domicilii* [134] at the time of making the will.

The Commission is of the opinion that the Act's choice of law rules should apply in respect of the capacity to make a will, as well as to the will's formal and intrinsic validity. Capacity is the only requirement for a valid will for which the conflict of laws rule has not been codified. Codification is desirable from the point of view of both the comprehensiveness and instructive purpose of the Act.

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[132]BCLRC, *supra* n. 9, at 110.

[133]The law of the jurisdiction in which the immovable is situated.

[134]The law of the jurisdiction which the testator is domiciled.

RECOMMENDATION 39

The conflict of laws rules provisions should include the testator's capacity.

Clause 42(2)(b) deals with revocation of a will by a subsequent will as provided for in clause 16(b). In order for the clause to be comprehensive, it ought also to deal with revocation by "a later writing declaring an intention to revoke ... and made in accordance with the provisions of this Act governing the making of a will" which is provided for in clause 16(c), as well as the testator's capacity.

RECOMMENDATION 40

A provision similar to clause 42(2)(b) of the current Act should include any writing made in accordance with the Act declaring an intention to revoke an existing will. The clause should also expressly provide that the testator's capacity to make the later will must also conform to the relevant law.

As discussed above, a will may be revoked by destruction, pursuant to clause 16(d) of the Act. At common law, the *lex domicilii* of the testator at the time of destruction governs the revocatory effect of an act of destruction regarding gifts of movables, and the *lex situs* applies as regards immovables. For the reasons set out earlier regarding choice of law rules, the Commission is of the opinion that a single set of choice of law rules should apply to the destruction of wills as well. Ideally, that set of rules should be the same as those that apply to the formal and intrinsic validity of wills, and the testator's capacity.

RECOMMENDATION 41

The Act ought to include a single set of conflict of laws rules relating to the revocatory effect of the destruction of a will.

The common law is unclear about the revocatory effect of a subsequent divorce on testamentary provisions dealing with immovables. Canadian case law is clear that, with respect to *marriage*, it is the testator's *lex domicilii* at the time of the marriage that governs the revocatory effect for both movables and immovables.[135] With respect to *divorce*, however, the Ontario Court of Appeal has applied the *lex situs* for immovables.[136] The Commission agrees with Professor Castel that, with respect to both movables and immovables

> ... the effect of divorce or annulment of marriage on wills should be determined by the law of the testator's domicile at the time of the decree ... [because] this is a matter of matrimonial law and not

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[135] See, e.g., *Allison* v. *Allison* (1998), 23 E.T.R. 237 (B.C.S.C.).

[136] *Page Estate* v. *Sachs* (1993), 12 O.R. (3d) 371 (C.A.).

testamentary law....[137]

The term "domicile and habitual residence" as defined in *The Domicile and Habitual Residence Act* should however be substituted for the term "domicile".

RECOMMENDATION 42

The Act should include a set of conflict of laws rules relating to the revocatory effect of a subsequent marriage, divorce and annulment, for both movables and immovables, with domicile and habitual residence (as defined in* The Domicile and Habitual Residence Act*) at the time of the marriage, divorce and annulment being the relevant connecting factor.

Finally, concerning the construction of a will, the common law provides that initially a court should attempt to give effect to the testator's intention without reference to rules and presumptions of law. However, if the testator's intention cannot be ascertained without resort to law, a court should, at common law, refer itself to the law intended by the testator, if the intention is ascertainable. Only if necessary should the court take additional steps to determine which law is applicable to the construction of the will, with the connecting factor for both movables and immovables being the testator's domicile at the time the will was made. However, in the case of immovables, the *lex situs* would prevail if the testator purports to create an interest that is not permitted by the *lex situs*.

These common law principles are only partially reflected in sections 43 and 44 of the Act. The Commission is of the opinion that the legislation would be more instructive if it codified the common law as regards the construction of wills in its entirety, except that the common law reliance on "domicile" as the connecting factor ought to be replaced with "domicile and habitual residence" as defined in *The Domicile and Habitual Residence Act* for the reasons noted above.

RECOMMENDATION 43

The Act should codify, in their entirety, the common law choice of law rules regarding construction of wills, substituting "domicile and habitual residence" (as defined in* The Domicile and Habitual Residence Act*) for "domicile" as the connecting factor.

N. ADVANCEMENT OF A PORTION

At common law, if a parent makes a substantial *inter vivos* gift to a child after having made

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[137] J.-G. Castel, *Canadian Conflict of Laws* (4th ed., 1997) 531.

a will benefitting the child, the gift is presumed to be an advancement of the testamentary benefit.[138] *The Intestate Succession Act* has changed that presumption with respect to intestacies: such a gift is presumed to be merely a gift, not an advancement.[139] It seems to us that the approach adopted in that Act more likely reflects the intentions of most testators as regards *inter vivos* gifts to children than does the common law. Accordingly, the Commission recommends that a similar provision be added to *The Wills Act*.

RECOMMENDATION 44

The Act should provide that an* inter vivos *gift to a child by a parent is presumed not to be an advancement.

O. CORRECTION OF MISTAKEN WORDING AND CONSTRUCTION OF AMBIGUOUS WORDING

The law respecting problematic testamentary wording has developed along two lines: the law of mistake, which applies at probate; and the law of construction, which applies after the will has been probated. As a result of this bifurcation, different remedies and different rules of evidence apply to issues arising out of the will, depending on whether the will has or has not been probated.

1. Mistake

At the probate stage, the court decides what document(s), if any, and what words comprise the will of a deceased person. The court has a very limited jurisdiction to correct mistaken wording; it cannot correct mistaken wording of which the testator knew, either actually or constructively, and presumably approved by signing the will or codicil. Since the mid-19th century, when reading over of the will by the testator was considered "conclusive" evidence of the testator's knowledge of the will's contents, the common law has evolved to its current state where a reading over "must be given the full weight apposite in the circumstances." Currently, then, there must be more than "a mere literal physical fact of reading"; the reading must be such that the words of the document must have registered on the consciousness of the testator. Of course, the length and complexity of the document is significant in determining whether the testator had knowledge of the mistaken wording.[140]

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[138] Feeney, *supra* n. 91, at para. 15.72-15.74.

[139] *The Intestate Succession and Consequential Amendments Act*, S.M. 1989-90, c. 43, s. 8(5).

[140] *In re Morris*, [1971] P. 62.

Absent actual knowledge of the contents of the will, the common law provides that a testator has constructive knowledge of, and is deemed to have approved, wording that was consciously, intentionally and purposefully employed by a drafter. Only wording that was inserted inadvertently by the drafter may be corrected under common law.

Thus, apart from one particular situation,[141] a probate court can only correct mistaken wording if the testator had no effective actual knowledge of the mistake or the mistake is caused by words inadvertently employed by the drafter. In these circumstances, the court is entitled under common law to delete, *but not add*, words to correct the mistake. For example, where a testator instructs a gift "to my nieces and nephews" and the drafter inadvertently words the gift "to my nephews", the probate court is powerless to add "and nieces" to correct the mistake.[142] On this point, recently in *Re Rapp Estate*, Justice Donald stated:

> I am unable to see any reason in principle why words cannot be inserted ... where the words are simply left out by the draftsman ... if ... the surrounding language of the will necessarily implies the additional words.[143]

However, a subsequent decision expressly disapproved of Justice Donald's statement.[144]

2. Construction

In its 1973 Report, *Interpretation of Wills*, the English Law Reform Committee identified two problem areas concerning the evidentiary law of construction: namely, the admissibility of extrinsic evidence and the inapplicability of the equitable doctrine of rectification to wills.[145]

Regarding the admissibility of extrinsic evidence, the Committee stated:

> There is a substantial body of case-law on the admissibility of extrinsic evidence in the interpretation of wills, and it is not easy to extract from the reports a straightforward or consistent set of principles.[146]

To the extent that the common law principles can be generalized, they are based on the

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[141]That situation is where two parties have inadvertently signed each other's wills: *In re Thorleifson Estate* (1954), 13 W.W.R. (N.S.) 515 (Man. Surr. Ct.).

[142]*In re Morris*, *supra* n. 140.

[143]*Re Rapp Estate* (1991), 42 E.T.R. 222 at 227 (B.C.S.C.).

[144]*Alexander Estate* v. *Adams* (1998), 20 E.T.R. (2d) 294 (B.C.S.C.).

[145]Law Reform Committee (U.K.), *Interpretation of Wills* (Report #19, 1973) 3 [LRC(UK)].

[146]*Id.*, at 3.

"Wigram" rules, which derive from Sir James Wigram's *Admission of Extrinsic Evidence in Aid of the Interpretation of Wills*.[147] The fundamental rule is that, in determining the testator's intention, the words of the will are *prima facie* to be construed according to their "strict and primary acceptation," subject to three qualifications. First, the whole will is to be read and treated as the testator's "dictionary". Second, extrinsic evidence of the circumstances surrounding the making of the will, such as the state of the testator's family, relationships, and property, is admissible to resolve ambiguity; this is the "armchair" rule. Finally, if the words do not make sense according to the strict and primary meaning, and they have a "popular or secondary" meaning that does make sense, that meaning can be applied.

The extrinsic evidence that may be permitted under the "armchair" rule does not include direct evidence of the testator's intention, such as oral and written statements by the testator, including instructions given to the drafter. Evidence of this nature is admissible only to deal with an equivocation, otherwise described as a "latent ambiguity". An equivocation or latent ambiguity is one that is not immediately apparent. Instead, the ambiguity is revealed from a reading of the whole will, or from evidence of the surrounding circumstances, by which it becomes clear that the words of the will apply equally to two or more persons or things.[148]

Although under the Wigram rules (also described as the "traditional" or "objective" approach to will construction), the primary focus is on the expressed intent of the testator, with extrinsic evidence being admissible only if the words of the will, read as a whole and strictly construed, result in an ambiguity, most courts now employ the armchair rule at the outset. As one author queries: "How can a court infer that a will is clear and unambiguous, or obscure and ambiguous, until the surrounding circumstances are considered?"[149] Courts employing the traditional approach (as opposed to those employing the armchair rule at the outset, described as the "subjective" approach) are chiefly concerned with maintaining the integrity of the requirements

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[147]LRC(UK), *supra* n. 145, at 3-4. The English Law Reform Committee sets out Wigram's seven rules in Appendix B of its report at 26-27.

[148]An example of an equivocation or latent ambiguity would be a gift to a named person, where there are two persons with the same name. Recent cases in which this issue has arisen include: *Re Rudaczyk* (1989), 69 O.R. (2d) 613 (H.C.J. (Gen. Div.)) (no ambiguity, direct evidence of the testator's intention not admissible); *Kernahan Estate* v. *Hanson* (1990), 39 E.T.R. 249 (Sask. C.A.) (no equivocation with the word "issue", direct evidence of the testator's intention inadmissible); *Krezanoski* v. *Krezanoski* (1992), 6 Alta. L.R. (3d) 145 (Q.B.) (solicitor's secretary inadvertently did not include the instructed residuary gift; the testator attended at the solicitor's office, before the solicitor had a chance to check the will, signed the will, and took it with him; there being no equivocation, the court refused to consider the direct evidence of the testator's instructions, commenting "I reach this conclusion with some regret as it appears to me that the testator's wishes with respect to the disposition of this property will not be respected and his property will pass to brothers to whom he did not wish to leave his estate"; this is the very kind of utterance of which Lord Denning was so scornful in his dissenting reasons in *In re Rowland*, [1963] Ch. 1, at 9-10); *Sparks Estate* v. *Wenham* (1993), 91 Man. R. (2d) 52 (Q.B.) (no equivocation, "extrinsic evidence" not admissible); *MacEachen* v. *McGregor* (1994), 4 E.T.R. (2d) 182 (Sask. Q.B.) (equivocation, direct evidence of the testator's intention admissible); *Jackson Estate* v. *Jackson* (1994), 4 E.T.R. (2d) 245 (B.C.S.C.) (same decision respecting issue as in *Kernahan*, but the court managed to give effect to the testator's intention from a reading of the whole will); *Stafford Estate* v. *Thissen* (1996), 12 E.T.R. (2d) 201 (Ont. C.J. (G.D.)) (direct evidence of the testator's intention ruled inadmissible); and *Re Bruce Estate* (1998), 24 E.T.R. (2d) 44 (Y.T.S.C.) (no equivocation, direct evidence of the testator's intention not admissible).

[149]Feeney, *supra* n. 91, at 10.52.

of writing, knowledge and approval, and due execution.[150] Advocates of the traditional approach are inclined to believe that if indirect evidence of the testator's intention derived from the surrounding circumstances and direct evidence of the testator's intention are admitted into evidence,

> ... the authenticity of a will would no longer repose on a ceremony of execution exacted by the statute, but would be set at large in the wide field of parol conflict, and confined to the mercies of memory. The security intended by the statute would thus perish at the hands of the court.[151]

This concern for the integrity of the formal requirements, and the lack of any reliable means for divining the testator's intention (in the absence of extrinsic evidence), explain why the probate court may only delete words and has no power to rectify a will.

As noted above, courts willing to entertain evidence of the circumstances surrounding the making of the will, i.e., employing the armchair rule at the outset, are said to be following a "subjective" approach. Canadian courts appear to favour this approach.[152] However, although the subjective approach involves the immediate application of the armchair rule, the admissibility of direct extrinsic evidence of the testator's intention continues to be restricted to resolving instances of latent ambiguity, i.e. equivocation.[153]

In construing a will, while the court cannot actually rectify the wording (although judicial reasons are not infrequently written in terms of rectification), it can read the will, or order the will to be read, as if words were omitted,[154] or changed,[155] or inserted.[156]

3. Reform

In its 1973 Report, the English Law Reform Committee advocated that the court must be given a power to rectify and that the law respecting construction needed to be reformed. The

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[150]The most frequently cited older authority for the traditional approach is *Higgins* v. *Dawson*, [1902] A.C. 1 (H.L.); in Canada, the approach has been applied in, *inter alia*, *Tottrup* v. *Patterson*, [1970] S.C.R. 318 at 322, and more recently *Re Omilusik Estate* (1989), 31 E.T.R. 144 (Alta. Surr. Ct.) and *MacDonald* v. *Brown Estate* (1995), 6 E.T.R. (2d) 160 (N.S.S.C.).

[151]*Guardhouse* v. *Blackburn*, (1866) L.R. 1 P. & D. 109 at 117.

[152]Feeney, *supra* n. 91, at 10.53-10.54. A leading recent example is *Haidl* v. *Sacher* (1979), 2 Sask. R. 93 (C.A.), relying on, *inter alia*, *Marks* v. *Marks* (1908), 40 S.C.R. 210.

[153]Feeney, *supra* n. 91, at para. 11.103

[154]*Re Phillips Estate* (1987)), 27 E.T.R. 107 (Sask. Surr. Ct.); *MacEachen* v. *McGregor*, *supra* n. 148.

[155]*Re Bergey Estate* (1995), 103 Man. R. (2d) 202 (Q.B.).

[156]*Re Phillips Estate*, *supra* n. 154; *Colthorp* v. *Hall* (1989), 34 E.T.R. 86 (B.C.S.C.); and *Wagg* v. *Bradley* (1996), 11 E.T.R. (2d) 313 (B.C.S.C.).

Committee recommended permitting the court "on convincing proof" to rectify the will in two situations: (a) where a clerical error had been made; and (b) where the will's drafter had misunderstood the testator's instructions.

With regard to construction, all of the Committee members recommended that the Wigram rules should be

> ...modified to allow the admission of extrinsic evidence of material facts for the purpose of establishing the special meaning or significance which the testator was accustomed to attach to any word, name or expression used in the will, or of establishing, as well as resolving, any equivocation in a will, notwithstanding that the ambiguity is not apparent on the face of the will.[157]

A majority of the Committee members (8 members) were in favour of further modifying the Wigram rules to allow the admission of such extrinsic evidence, except direct evidence of the testator's intention, at the outset of the court's inquiry. A minority of members (5 members) favoured the admissibility of extrinsic evidence, *including* direct evidence of the testator's intention.

In 1982, the United Kingdom Parliament enacted the *Administration of Justice Act*,[158] adopting the Committee's recommendation regarding rectification of clerical errors and misunderstandings on the part of the drafter. As well, the new legislation adopted the minority's point of view with respect to the admissibility of extrinsic evidence. The relevant provisions are as follows:

> **Rectification**
> 20. (1) If a court is satisfied that a will is so expressed that it fails to carry out the testator's intentions, in consequence–
> (a) of a clerical error; or
> (b) of a failure to understand his instructions,
> it may order that the will shall be rectified so as to carry out his intentions.
>
> ...
>
> **Interpretation of wills-general rules as to evidence**
> 21. (1) This section applies to a will –
> (a) in so far as any part of it is meaningless;
> (b) in so far as the language used in any part of it is ambiguous on the face of it;
> (c) in so far as evidence, other than evidence of the testator's intention, shows that the language used in any part of it is ambiguous in the light of surrounding circumstances.
>
> (2) In so far as this section applies to a will extrinsic evidence, including evidence of the testator's intention, may be admitted to assist in its interpretation.

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[157] LRC(UK), *supra* n. 145, at 15.

[158] *Administration of Justice Act 1982* (U.K.), 1982, c. 53.

In its 1982 Report, the Law Reform Commission of British Columbia largely endorsed these reforms.[159] With respect to rectification, however, that Commission stated that it would go further in its recommendations, noting the shortcomings of the new power of rectification given to the court:

> It would not remedy those problems which arise where the words used were intended by the testator, but are clearly insufficient to support the meaning he attached to them; nor would it assist the court to give effect to a gift when the event which occurs is not provided for in the will.[160]

After considering arguments for and against a very broad power of rectification, the Commission made the following recommendation:

> 5. (a) Legislation should be enacted to provide that if a court is satisfied that a will is so expressed that it fails to carry out the testator's intentions, in consequence of
>
> (I) an error arising from an accidental slip or omission;
> (ii) a misunderstanding of the testator's instructions;
> (iii) a failure to carry out the testator's instructions; or
> (iv) a failure by the testator to appreciate the effect of the words used;
>
> it may order that the will be rectified.
>
> (b) For the purposes of rectification, the court may admit all relevant evidence including statements made by the testator or other evidence of his intent.[161]

In support of its recommendation, that Commission stated:

> ... we think the English approach too narrow. If a power to rectify is to be tied to proof of a mistake, we still think the courts should have power to correct a mistake when the testator acts as his own draftsman. In all likelihood, more mistakes will occur in homemade wills than in professionally drafted wills. To that end, in addition to the two sources of error listed in section 20(1) of the English legislation, we think an additional clause should be added: a failure by the testator to appreciate the effect of the words used. We have also concluded that a provision which permits the courts to rectify a will should also recognize that errors can arise when the testator's draftsman understands but fails to carry out the testator's instructions. A mistake by the draftsman will not necessarily be the result of clerical error. An additional clause to that effect should also be added. Moreover, rather than use the narrow term "clerical error" we think the clause "an error arising from an accidental slip or omission" should be used. This is patterned after Rules 42(23) of the British Columbia Supreme Court Rules, the "slip rule," which empowers the courts to correct errors made in pleadings. This formulation is broader than a "clerical error" and avoids problems that may arise in establishing how an error arose. Moreover, there is useful case law on the ambit of Rule 42(23) which will help the courts when using this power to rectify a will.

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[159]Law Reform Commission of British Columbia, *Interpretation of Wills* (Report #58, 1982) 19-22 [BCLRC].

[160]*Id.*, at 46-47.

[161]BCLRC, *supra* n. 159, at 50.

....

> We have also concluded that both the Court of Probate and the Court of Construction should be able to exercise this jurisdiction to correct a will. As we mentioned earlier, in some instances a Court of Probate must interpret the will, for example, to determine whether it was made in contemplation of marriage. However, the Court of Probate should be reluctant to exercise this jurisdiction, particularly if all interested parties are not before it. There is a significant distinction between the functions of the Court of Probate and the Court of Construction. The Court of Probate, when determining whether a will is valid, must satisfy itself that it contains the language the testator intended to use. The Court of Construction's function is to determine what intention is expressed by those words. This distinction between the function of the Court of Probate and that of the Court of Construction will dictate when it is appropriate for one court or the other to hear an application for rectification. Although this approach may not be totally satisfactory, we think these questions can be safely left to the courts.[162]

In a more recent report, the Australian National Committee for Uniform Succession Laws recommended rectification legislation virtually identical to section 20 of the *Administration of Justice Act 1982*.[163]

The *Wills Act*[164] of the Australian Capital Territory contains the following provision, which goes much further than either the United Kingdom legislation or the British Columbia recommendation:

> 12A (1) If the court is satisfied that the probate copy of the will of a testator is so expressed that it fails to carry out his or her intentions, it may order that the will be rectified so as to carry out the testator's intentions.
>
> (2) If the court is satisfied that circumstances or events existed or occurred before, at or after the execution by a testator of his or her last will, being circumstances or events –
> (a) that were not known to, or anticipated by, the testator; or
> (b) the effects of which were not fully appreciated by the testator; or
> (c) that occurred at or after the death of the testator;
> in consequence of which the provisions of the will applied according to their tenor would fail to accord with the probable intention of the testator had he or she known of, anticipated or fully appreciated the effects of those circumstances or events, the court may, if it is satisfied that it is desirable in all the circumstances to do so, order that the probate copy of the will be rectified so as to give effect to that probable intention.

It seems to us that this provision, which gives the court an almost unfettered power of rectification, is aptly described by the New South Wales Law Reform Commission as

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[162] BCLRC, *supra* n. 159, at 49-50.

[163] Australian National Committee for Uniform Succession Laws, cited in New South Wales Law Reform Commission, *Uniform Succession Laws: The Law of Wills* (Report #85, 1998) 106 *et seq.* [NSWLRC].

[164] *Wills Act 1968* (ACT), s. 12A.

"revolutionary".[165] In our opinion, such a provision comes perilously close to permitting the court simply to re-write the testator's will and is, for that reason, undesirable.

On the issue of rectification, we are persuaded that the approach adopted by the Law Reform Commission of British Columbia represents the most desirable balance between the need to empower the court to carry out the intentions of the testator and the need to ensure that wills cannot be varied other than in accordance with the requirements of the Act.

RECOMMENDATION 45

The Act should provide that, if a court is satisfied that a will is so expressed that it fails to carry out the testator's intentions, in consequence of

(a) an error arising from an accidental slip or omission;

(b) a misunderstanding of the testator's instructions;

(c) a failure to carry out the testator's instructions; or

(d) a failure by the testator to appreciate the effect of the words used;

it may order that the will be rectified.

Concerning the construction of wills, the Law Reform Commission of British Columbia supported the reforms respecting the admissibility of extrinsic evidence introduced by the 1982 United Kingdom legislation. That Commission noted with approval:

> The effect of subsections (a), (b) and (c) [of section 21 of *The Administration of Justice Act 1982*] is to require a "peg" upon which extrinsic evidence might be introduced. That approach is designed to avoid problems that might arise if disappointed relations sought to raise issues of interpretation based solely upon evidence of the testator's statements respecting the effect of his will. Only if a question of interpretation arises on the face of the will or by reference to extrinsic circumstances is evidence of the testator's intention admissible to resolve that question. That approach ensures that the language of the will does not become a side issue.
>
> ....
>
> We have concluded that this should be the proper approach to the interpretation of a will. We are therefore of the view that evidence of extrinsic circumstances and direct evidence of dispositive intent should be admissible to aid the courts in the interpretation of a will.[166]

The Law Reform Commission of British Columbia emphasized that, despite this loosening of the rules of evidence, evidence of the testator's intention must not be allowed to override the words of the will, since to do so would be to permit the testator to vary, revoke, or revive portions of his or her will orally. It reasoned:

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[165]NSWLRC, *supra* n. 163, at 105.

[166]BCLRC, *supra* n. 159, at 20.

> Allowing the testator's last expressed wishes to control the effect of his will would amount to sanctioning oral variation of wills. Permitting oral variation of wills would open the door to the dangers avoided by the formalities of execution.
>
> > The time when the testator's intent is expressed is irrelevant, so long as it is an expression of what the testator intended his will to mean at the time when it was made. But in no event should evidence of that intent override the words of a will. Otherwise a testator could alter, vary, revoke or revive portions of his will orally, without following the required formalities.[167]

The British Columbia Commission also considered the myriad of rules and presumptions relied on by the courts in construing wills, and stated:

> The rules of construction are an aid to objective interpretation. If the courts give the testator's will the effect he intended it to have, the rules of construction can have no place in the inquiry, except perhaps as guides to correct interpretation.[168]

We concur with the British Columbia Commission that, while the rules and presumptions of construction should not be abolished, legislation should be enacted "to confirm that a result flowing from an application of a rule of construction ... should not be preferred to a result flowing from the meaning of the testator, when executing his will, attached to those words."[169] As well, this Commission agrees that the proviso "subject to a contrary intention appearing by the will" (and variations thereof), which appears in numerous sections of *The Wills Act*, should be expanded, where appropriate, by adding that the contrary intention may also be established "by other relevant evidence."[170] This would, of course, complement the Commission's recommendation in favour of the general admissibility of extrinsic evidence for the constructions of wills (below).

Finally, the Commission concurs with the reasoning of the Australian National Committee for Uniform Succession Laws, which recommended the inclusion of an explicit statement that the new rules of evidence (i.e., those being proposed by the Committee, similar to section 21 of the United Kingdom's *Administration of Justice Act 1982*) do not constitute a complete code, and do not preclude the admission of evidence that would previously have been admissible. The Australian Committee stated:

> The National Committee is of the view that words to the following effect should be included in the model provision:
>
> > Nothing in this section renders inadmissible extrinsic evidence which is otherwise admissible by law.

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[167]BCLRC, *supra* n. 159, at 22.

[168]BCLRC, *supra* n. 159, at 34.

[169]BCLRC, *supra* n. 159, at 36.

[170]BCLRC, *supra* n. 159, at 38.

This could foreclose possible argument that the provision is a comprehensive code. It cannot, of course, be a code because it does not address the question of admissibility of extrinsic evidence of the testator's intention to fortify or rebut equitable presumptions of intention; nor does it, for that matter, refer to the case of equivocation.

The National Committee is nevertheless of the view that, for reasons of certainty, it is desirable to include these words.[171]

RECOMMENDATION 46

The Act should provide that, where any part of a will is meaningless or ambiguous either on its face or in the light of evidence (other than evidence of the testator's intention), extrinsic evidence, including statements made by the testator or other evidence of his intent, may be admitted to assist in its interpretation, which interpretation shall be preferred to one resulting from the application of a rule of construction. The legislation should also include a provision stating that the new rule should not render inadmissible extrinsic evidence that is otherwise admissible by law.

RECOMMENDATION 47

Where it is deemed appropriate to do so, provisions which contain the words "subject to a contrary intention appearing by the will" should also include the words "or from other relevant evidence".

P. THE ABSOLUTE AND REMAINDER GIFTS CONUNDRUM

When a testator expresses a gift in absolute terms and adds words that apparently give a remainder estate to someone else (for example, "I leave everything to my wife, and after her death to my children"), the outcome will differ according to which of two interpretations regularly applied by Canadian courts is adopted. According to one interpretation, the first phrase prevails and the remainder estate is invalid because it is repugnant to the initial absolute gift; under the other interpretation, the subsequent wording limits the initial gift to a mere life estate. Curiously, Manitoba courts have had to deal with this issue more often than the courts of any other province, and the Manitoba Court of Appeal has applied both interpretations.[172] Two Ontario cases are often

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[171] Australian National Committee for Uniform Succession Laws, as cited in NSWLRC, *supra* n. 163, at 123.

[172] Cases that have ruled in favour of a fee simple estate include: *In re Robinson*, [1930] 2 W.W.R. 609 (Man. C.A.); *In re Kane Estate*, [1934] 2 W.W.R. 202 (Man. C.A.); *In re Troup Estate*, [1945] 1 W.W.R. 364 (Man. K.B.); *Re Keroack Estate* (1957), 24 W.W.R. (NS) 145 (Man. Q.B.); *Re Freedman*, [1974] 1 W.W.R. 577 (Man. Q.B.); and *Re Rankin's Will* (1980), 4 Man. R. (2d) 209 (Q.B.). Cases that have upheld a life estate include: *Re Salter Estate*, [1917] 2 W.W.R. 1013 (Man. K.B.); *In re Maltman Estate*, [1926] 3 W.W.R. 755 (Man. C.A.); *In re Ridd Estate*, [1947] 2 W.W.R. 369 (Man. K.B.); and *Re Schumacher* (1971), 20 D.L.R. (3d) 487 (Man. C.A.).

cited on this issue.[173]

Numerous arguments have been advanced in favour of construing such wording as comprising a fee simple gift to the first beneficiary with the second gift being invalid as repugnant to the first gift. In *Re Kane*, for example, Chief Justice Prendergast stated:

> [A] gift made in terms that would make it absolute if it stood alone ... [cannot be cut down by a second gift]. It is not a matter ... of making out the testator's intention for it is quite plain that he intends that there should be a gift over. The point is that the two gifts are considered to be incompatible and, as one of them must give way, the first and main one is maintained and the other held a nullity.[174]

In *Re Walker*, the Ontario Court of Appeal stated that the testator's

> ... intention is plain but it cannot be given effect to. The Court has then to endeavour to give such effect to the wishes of the testator as is legally possible, by ascertaining which part of the testamentary intention predominates and by giving effect to it, rejecting the subordinate intention as being repugnant to the dominant intention.[175]

Language such as "what remains"[176] and "if any is left," for example, have been interpreted by the courts as indicating that a full right of alienation has been granted in the first gift, thus implying that the testator must have intended to give a fee simple gift.

Numerous arguments also exist in favour of construing such wording so as to give effect to both gifts, with the first being the gift of a life estate, perhaps with a power to encroach on the capital. It has been argued, for example, that the meaning of such wording, "from the natural, logical, common sense point of view," is that the testator intended gifts comprising a life estate, perhaps with a power to encroach on capital, and a remainder estate; why else would the testator have added the additional gift?[178] The court should be trying to give effect to the testator's intention, derived from the words used and the surrounding circumstances.[179] In one leading case, the majority judgment, while acknowledging that "if two bequests are in conflict and are irreconcilable, one or the other must give way", cautioned that "the legal concept of repugnancy

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[173]*Re Walker* (1925), 56 O.L.R. 517 (App. Div.) and *Re Hornell*, [1945] O.R. 58 (C.A.).

[174]*In re Kane Estate*, *supra* n. 172, at 203.

[175]*Re Walker*, *supra* n. 173, at 522.

[176]*Re Hornell*, *supra* n. 173, per the majority.

[177]*In re Kane Estate*, *supra* n. 172, at 204, per Prendergast C.J.

[178]*Re Hornell*, *supra* n. 173, at 63-66, per the minority.

[179]*Re Hornell*, *supra* n. 173, at 62, per the minority.

can be carried too far".[180]

> It seems to me that unless there is an obvious and clear conflict created by two provisions of a will, the Court should not be alert to frustrate the expressed intention of a testator by seeing repugnancy where none truly exists.[181]

It has also been suggested that, where a will contains two irreconcilable testamentary gifts, the "posterior" prevails as it expresses the testator's final intention.[182] Finally, it has been argued that wording such as "what remains" or "if any is left" indicates no more than a life estate with a power to encroach on capital, but no power to alienate by will.[183]

The English Law Reform Committee considered the absolute and remainder gifts conundrum in its 1973 Report and suggested:

> In most cases, probably what the testator would have said if the point had been raised with him is that his wife should have full power to dispose of capital and income but if anything was left over on her death it should go to the children. This may be said with the more confidence because in many cases where the point arises when instructions for a will are being taken, the testator says that this is what he wants to happen. When on such occasions it is explained that he cannot do it in quite that way, he will probably in most cases choose to make an absolute gift to his wife or at least to give her a life interest with power to advance capital to her, which are the two nearest legitimate ways of achieving his object. What he probably seldom chooses, and seems most unlikely to want, is for his wife to have a bare life interest with remainder to the children.[184]

Following the recommendation of the Law Reform Committee, the British Parliament adopted the following statutory rule in which all such gifts are construed as absolute.

> Except where a contrary intention is shown it shall be presumed that if a testator devises or bequeaths property to his spouse in terms which in themselves would give an absolute interest to the spouse, but by the same instrument purports to give his issue an interest in the same property, the gift to the spouse is absolute notwithstanding the purported gift to the issue.[185]

The Commission is convinced that a statutory rule of construction is necessary to remove the existing uncertainty in the law. This uncertainty has resulted in much litigation, a trend which is likely to increase given the prevalence of multiple marriages, blended families and the rising

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[180] *Re Schumacher*, *supra* n. 172, at 491.

[181] *Re Schumacher*, *supra* n. 172 at 494.

[182] R. Jennings and J.C. Harper, *Jarman on Wills* (8th ed., 1951) 576.

[183] See, for example, *In re Robinson Estate*, *supra* n. 172; and *In re Kane Estate*, *supra* n. 172.

[184] LRC(UK), *supra* n. 145, at 21.

[185] *Administration of Justice Act 1982* (U.K.), 1982, c. 53, s. 22.

popularity of so-called "do it yourself" will kits. While a statutory rule will not always accomplish what the testator would have wanted, it will create certainty and, in most cases, will come close to achieving those wishes.

Having decided that a statutory rule is required, we have struggled with the question of what the rule of construction should be. Should such gifts be construed as an absolute gift to the first beneficiary or should they be construed as a life interest with a power to encroach upon capital?

We considered a number of options but were unable to reach a unanimous consensus, a problem reminiscent of many court decisions on this point, as noted above. The majority of members agree with the English Law Reform Committee in its opinion that most testators, upon being advised of the law, would choose an absolute gift to the primary beneficiary rather than a life estate. However, in our view, the words "unless a contrary intention is shown" are redundant as the phrasing of such a disposition will always imply a "contrary intention".

We also believe that the statutory rule of construction should apply to all such gifts and not just those in favour of a spouse with a remainder gift to the issue. The difficulty posed by irreconcilable absolute and remainder gifts is not limited to situations involving a gift to a spouse and any reform in accordance with our recommendation ought to apply in all such cases.

RECOMMENDATION 48

The Act should provide that where a testator devises or bequeaths property in terms which in themselves would give an absolute interest to one person but by the same instrument purports to give another person an interest in the same property, the gift to the first person is absolute notwithstanding the purported gift to the second person.

CHAPTER 3

THE LAW OF PROPERTY ACT

The Law of Property Act[1] primarily sets down rules that relate to dealings with real property. It has been included in this Report solely because of the provisions in the Act that deal with the manner in which real property is to be called on to make certain payments during the administration of an estate. Those rules, and the common law of abatement to which they relate, are inextricably linked to provisions in other legislation and, as a result, many of the recommendations in this Report refer to legislation other than *The Law of Property Act*. Nevertheless, it is convenient to deal with all these interconnected legislative provisions in a single Chapter.

A. ABATEMENT

A testator can designate assets of his or her estate to be used to pay debts, funeral expenses, and the costs of administering the estate. When a will does not contain such a provision, or to the extent that the assets designated are insufficient, the common law of abatement applies.

Generally, under the common law of abatement, the personal property must be entirely used up before resort is made to the real property, in the following order: intestate personalty; residuary personalty; personalty comprising general gifts, including legacies; and, finally, personalty comprising specific and demonstrative gifts. If, after all that, realty is required to satisfy debts, residuary realty and specific devises are treated equally.[2]

Manitoba is one of many jurisdictions that have superseded the common law of abatement by legislation. Subsections 17.3(4) and (5) of *The Law of Property Act* read as follows:

> **Land to be dealt with in the same way as chattels real**
> **17.3(4)** Subject to section 36 of The Wills Act, all enactments and rules of law relating to the effect of probate or letters of administration respecting chattels real, respecting the dealing with chattels real before probate or administration, and respecting the payment of costs of administration and other matters in relation to the administration of personal estate, and the powers, rights, duties, and liabilities of the personal representative in respect of personal estate, apply to land, so far as they are applicable, as if the land were a chattel real vesting in the personal representative, except that some or one only of several joint personal representatives shall not sell or transfer land without

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[1] *The Law of Property Act*, C.C.S.M. c. L90.

[2] *Feeney's Canadian Law of Wills* (4th ed., 2000) paras. 8.49-8.55; and C.V. Margrave-Jones, *Mellows: The Law of Succession* (5th ed., 1993) paras. 30.53-30.58.

the approval of a judge of the Court of Queen's Bench.

Land to be administered in the same way as personal estate
17.3(5) Subject to section 36 of The Wills Act, in the administration of the assets of a deceased person, the person's land shall be administered in the same manner, subject to the same liabilities for debts, costs, and expenses, and with the same incidents, as if it were personal estate, but nothing in this subsection alters or affects the order in which real and personal assets, respectively, are now applicable in or towards the payment of funeral or testamentary expenses, debts, or legacies, or the liability of land to be charged with the payment of legacies.

Subsection 17.3(4) appears to be intended to supersede the common law treatment of residuary realty as if it comprises a specific devise. Subsection 17.3(5) provides that, for the specific purpose of paying debts, funeral expenses, and the costs of administering an estate, all assets, both real and personal, are to be used; apart from that, the common law rules of abatement apply.

Subsection 17.3(4) appears to be unnecessarily verbose, and neither subsection is particularly clear. The Commission believes that these provisions of *The Law of Property Act* should be rewritten, in plain language, so that their meanings are clear.

A further shortcoming of subsections 17.3(4) and (5) is the fact that there is no provision for a testator to "opt out" of the order of abatement. The Commission considers that it should always be open to a testator, should he or she wish, to make provisions that differ from those in these subsections.

We concur with the proposal set out in the Alberta Law Reform Institute's recent Report for Discussion[3] and accordingly recommend that subsection 17.3(4) and (5) be replaced with similarly framed legislation.

RECOMMENDATION 49

The Law of Property Act ***should provide that, for the payment of unsecured debts, funeral expenses, and the costs of administering the estate, the order in which assets are used shall be:***

(a) ***assets specifically charged with the payment of debts or left on trust for the payment of debts;***
(b) ***assets passing by way of intestacy and residue;***
(c) ***assets comprising general gifts;***
(d) ***assets comprising specific and demonstrative gifts;***
(e) ***assets over which the deceased had a general power of appointment that has been expressly exercised by will.***

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[3]Alberta Law Reform Institute, *Order of Application of Assets in Satisfaction of Debts and Liabilities* (Report for Discussion #19, 2001) 45-46.

RECOMMENDATION 50

The Law of Property Act ***should provide that each class should include both personal property and real property, and no distinction should be made between the two types of property within a given class.***

RECOMMENDATION 51

The Law of Property Act ***should provide that each asset within a given class should contribute rateably to payment of debts.***

RECOMMENDATION 52

The Law of Property Act ***should provide that, to charge property with payment of debts or to create a trust for payment of debts, a testator must do something more than:***

(a) give a general direction that debts be paid;
(b) give a general direction that the executor pay the testator's debts; or
(c) impose a trust that the testator's debts be paid.

RECOMMENDATION 53

The Law of Property Act ***should provide that the statutory order of application of assets may be varied by the will of the testator.***

Subsections 17.3(4) and (5) only change the law respecting the payment of debts, funeral expenses, and the costs of administering the estate; they do not apply to the fulfilment of gifts. Generally speaking, at common law, unless a testator creates a mixed fund of all the assets of the estate (for the payment of debts, funeral expenses, costs of administration, and the fulfilment of gifts), devises, including a realty component in the residuary gift, are fulfilled first, followed in turn by specific and demonstrative bequests, general bequests, and the personalty portion of the residuary gift. If the fund for a demonstrative gift either does not exist or is insufficient, the entire gift or the shortfall is treated as a general gift.[4] The preferential treatment of realty means that residuary realty is not available for the fulfilment of legacies, or other bequests.

The Law Reform Commission of British Columbia has said that it sees "no compelling reason why the rules governing the payment of debts should differ from those relating to the payment of pecuniary gifts so far as real property is concerned", and recommended remedial legislation to have residuary realty used equally with residuary personalty, not only for the payment of debts, funeral expenses and costs of administration, but also for the fulfilment of

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[4]Feeney, *supra* n. 2, at paras. 8.49-8.55; Margrave-Jones, *supra* n. 2, at para. 30.56.

pecuniary gifts.[5] We concur with this opinion but would go further than the British Columbia Commission by extending it to general bequests.

RECOMMENDATION 54

The Wills Act ***should provide that residuary personalty and realty are equally available for the fulfilment of general bequests, including legacies and demonstrative legacies.***

At common law, even if a testator creates a mixed fund of all the assets of the estate or designates real property for the payment of either debts and administration costs, or pecuniary gifts, without expressly exempting residuary personalty, nonetheless the latter will be used first.

Again, the British Columbia Commission has recommended remedial legislation[6] with which we concur.

RECOMMENDATION 55

The Wills Act ***should provide that real property charged with the payment of debts or pecuniary gifts is primarily liable for that purpose, notwithstanding a failure by the testator to exempt his or her personal property.***

It is also peculiar that the common law of abatement applies to the satisfaction of debts, funeral expenses, and costs of administration on a testacy, while different, statutorily prescribed rules of abatement apply to the satisfaction of an equalization payment under *The Marital Property Act*[7] and an order under *The Dependants Relief Act*.[8] The relevant subsections provide as follows:

The Marital Property Act

Payment of deficit by beneficiaries
41(2) An equalization payment under this Part shall be paid from the interests of the persons, other than the surviving spouse, who are beneficiaries of the estate, in proportion to the value of their respective interests in the estate, unless the will of the deceased spouse specifically provides for the manner in which the interests of the beneficiaries are to be used to satisfy an equalization payment, in which case the provisions of the will apply.

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[5]Law Reform Commission of British Columbia, *Wills and Changed Circumstances* (Report #102, 1989) 57.

[6]*Id.*, at 58.

[7]*The Marital Property Act*, C.C.S.M. c. M45, s. 41(2).

[8]*The Dependants Relief Act*, C.C.S.M. c. D37, s. 12(1).

The Dependants Relief Act

Incidence of provision ordered
12(1) Subject to subsection (2), the incidence of any provision for maintenance and support ordered shall
(a) be borne by the persons entitled to the deceased's estate in proportion to the value of their respective interests in the estate; and ....

Subsection 41(2) of *The Marital Property Act* but, again curiously, not subsection 12(1) of *The Dependants Relief Act*, provides for effect to be given to a testamentary direction.

There is no apparent reason why different abatement regimes should apply between, on the one hand, the satisfaction of general debts of the estate, funeral expenses, and the costs of administration and, on the other hand, the satisfaction of *The Marital Property Act* payments and *The Dependants Relief Act* awards. The Commission is of the opinion that this situation should be rectified.

RECOMMENDATION 56

Subsections 41(2) of* The *Family* Property Act *and subsection 12(1) of* The Dependants Relief Act *should be repealed and replaced with provisions imposing the same abatement regime that governs the payment of debts, funeral expenses, and costs of administering the estate, subject to a contrary testamentary direction.

CHAPTER 4

THE INTESTATE SUCCESSION ACT

The Intestate Succession Act[1] sets out the rules governing the distribution of property belonging to persons who die without having made a valid will, or whose will does not deal with their entire estate. The Commission believes that the Act should be amended in several respects.

A. WHERE NO SUCCESSORS

Sections 2-4 of the Act provide for succession by a spouse, issue, and ascendants and collaterals as remote as great-grandparents and their issue. Section 7 provides that, if there is no successor under the Act, the intestate estate goes to the Crown. Implicit in this is that great-great-grandparents, their issue, and other more remote relatives are not entitled to succeed. The Commission believes that the legislation would be more instructive if this limitation were made explicit.

RECOMMENDATION 57

The Intestate Succession Act ***should expressly stipulate that the only ascendant and collateral blood relatives who are entitled to succeed shall be those up to and including great grandparents and their issue.***

B. ADVANCEMENTS

Section 8 of the Act deals with the situation where a person dies intestate, but has given property to a prospective successor as an advance on what they will be entitled to on the person's death. It provides, in part:

> **Advancements**
> **8(1)** If a person dies intestate as to all of his or her estate, property which the intestate gave to a prospective successor during the lifetime of the intestate shall be treated as an advancement against that successor's share of the estate if the property was either
> (a) declared by the intestate orally or in writing at the time the gift was made; or
> (b) acknowledged orally or in writing by the recipient;
> to be an advancement.

There are two respects in which this section could be improved. First, it is not apparent

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[1] *The Intestate Succession Act*, C.C.S.M. c. I85.

why the application of the section has been restricted by the words "as to all of his or her estate". The policy rationale for this provision, presumably to give effect to what are deemed to be the wishes of the deceased, would seem to be equally applicable to cases of *partial* intestacy.

Second, with respect to clause (a), there is no obvious reason why the declaration that the gift is an advancement need be made "at the time the gift was made." The Commission believes that a gift ought to be treated as an advancement if the declaration is made at any time, either before or after the gift was made.

RECOMMENDATION 58

Section 8 of* The Intestate Succession Act *ought to apply equally to cases of whole and partial intestacies.

RECOMMENDATION 59

Section 8 of* The Intestate Succession Act *should treat as an advancement a gift declared by the testator to be an advancement, regardless of when the declaration is made.

C. CONFLICT OF LAWS

At common law, there are two different choice of law rules that apply to intestate succession. The law of the jurisdiction in which they are physically located (the *lex situs*) governs immovables, and the law of the jurisdiction in which the deceased is domiciled at death (the *lex domicilii*) governs movables. As mentioned earlier in Chapter 2, most, if not all, of the common law academic commentators have advocated the adoption of a single choice of law rule for both movables and immovables, namely the deceased's personal law at death.[2] The single choice of law rule is known as the "unity principle".

In *The Conflict of Laws*, Morris wrote:[3]

> According to the traditional rule of the English conflict of laws, intestate succession to immovables is governed by the *lex situs*; but there is far less direct authority for this rule than is sometimes supposed. The rule made some sense before 1926 when there were two systems of intestate succession in English domestic law, one for realty and the other for personalty. It makes no sense

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[2]L. Collins, ed., *Dicey and Morris on the Conflict of Laws* (12th ed., vol. 2, 1993) 1024; J.H.C. Morris, *The Conflict of Laws* (2nd ed., 1980) 337; P. North and J.J. Fawcett, *Cheshire and North's Private International Law* (13th ed., 1999) 999; J.-G. Castel, *Canadian Conflict of Laws* (1st ed., vol. 2, 1977) 448; J.G. McLeod, *The Conflict of Laws* (1983) 414-415; V. Black, Annotation to *Thom Estate* v. *Thom*, (1987) 27 E.T.R. 185 (Man. Q.B.); V. Black, Annotation to *Manitoba (Public Trustee)* v. *Dukelow*, (1994) 4 E.T.R. (2d)1 at 2 (Ont. C.J. (G.D.)).

[3]Morris, *supra* n. 2, at 337.

today when England and all other countries in the world except Bermuda have adopted one system of intestate succession for all kinds of property. Moreover, outside the common law world the *lex situs* rule for intestate succession to land has been abandoned almost everywhere except in Austria, Belgium and France. The author has elsewhere developed reasons for thinking that the *situs* rule has outlived its usefulness in England and should be abandoned in favour of the law of the intestate's domicile.

The retention of the *situs* rule frequently frustrates the intention of Parliament. For when Parliament passes a modern statute on intestate succession, it seeks to give effect to what the average intestate would have wished to do with his property, if he had made a will. What average intestate? Surely the obvious answer is, English intestates if the statute applies to England ....

Black wrote in his annotation to *Thom Estate* v. *Thom*:[4]

The decision of Oliphant J. has the virtue of mitigating one of the more absurd effects of the rule that intestate succession to immoveable property is governed exclusively by the law of the place in which it is situated .... That choice-of-law rule has long been the object of criticism (see, for example, Morris "Intestate Succession to Land in the Conflict of Laws" (1969), 85 LQ.R. 339) and it should not be necessary to do more than briefly rehearse those well-known criticisms here. The lex situs rule is the product of a time when England had different succession schemes for realty and personalty, a stituation [sic] which no longer exists, either in that country or in any western jurisdiction. At one time, England may well have had an interest in applying its internal scheme for devolution of estates in realty to all land located in that country. Its rule of primogeniture and forced heirship promoted dynastic wealth and ensured that land was not broken up into portions too small to permit efficient economic use. That is no longer the policy found in rules of intestate distribution. The distribution schemes of Canadian provinces are formulated so as to give effect to the presumed intentions of the average intestate of that jurisdiction. These statutory schemes do not embody land use policies. They simply apportion wealth among family members. Thus, in the instant case, it is no legitimate concern of Manitoba to which of these non-residents this wealth should devolve. If Saskatchewan dictates that spouses of its intestates should receive only the first $40,000 and a third of the remainder, Manitoba has no interest in applying its internal scheme to give such spouses an additional $10,000 plus half the residue. Any perceived conflict between the Manitoba and Saskatchewan intestacy distribution regimes is a false one.

Few cogent responses have ever made to these criticisms. *Redfield on Wills* (4th ed., 1876) maintains that the rule is justified because it would affront

> "the dignity, the independence, [and] the security of any independent state or nation, that [the descent of real estate] should be liable to be affected, in any manner, by the legislation, or the decisions of the courts, of any state or nation besides itself" (Vol. 1, p. 404)

Such an appeal to sovereignty is misplaced and, particularly between Canadian provinces, voices irrelevant concerns.

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[4]Black, Annotation to *Thom Estate* v. *Thom*, *supra* n. 2, at 185.

In *Thom Estate* v. *Thom* and *Manitoba (Public Trustee)* v. *Dukelow*,[5] both intestate succession cases, the courts moved towards the single law rule. In both cases, according to conventional conflict of laws dogma, since the deceased died owning immovables in places other than the place of their domicile at death, the surviving spouse was entitled to two preferential shares. In both cases, the courts decided that she should be entitled to only one preferential share, namely the higher one. Regarding the deceased's personal law, in *Dukelow*, the court moved away from the *lex domicilii* rule:

> The assets, irrespective of whether they are moveables or immovables, should be assembled under the administrator's umbrella, and after setting aside the highest preferential share permitted under the respective jurisdictions where the assets are located, the residue of the estate be divided by the applicable law of the deceased's usual or habitual place of residence.[6]

The court's reasoning is very similar to Manitoba's concept of domicile as it appears in section 8 of *The Domicile and Habitual Residence Act*.[7] Using habitual residence as the connecting factor is also similar to the approach taken under the *1989 Hague Convention on the Law Applicable to Succession to the Estates of Deceased Persons*,[8] which adopts the unity principle and applies a combination of connecting factors: habitual residence; nationality; and closest connection. Article 3 of the Convention reads:

> **Article 3**
>
> 1 Succession is governed by the law of the State in which the deceased at the time of his death was habitually resident, if he was then a national of that State.
>
> 2. Succession is also governed by the law of the State in which the deceased at the time of his death was habitually resident if he had been resident there for a period of no less than five years immediately preceding his death. However, in exceptional circumstances, if at the time of his death he was manifestly more closely connected with the State of which he was then a national, the law of that State applies.
>
> 3 In other cases succession is governed by the law of the State of which at the time of his death the deceased was a national, unless at that time the deceased was more closely connected with another State, in which case the law of the latter State applies.

Unfortunately, Canada has not yet adopted the Hague Convention, so it is not (yet) open to Manitoba simply to implement it. However, this is not to say that Manitoba cannot co-opt it by legislation.

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[5] *Thom Estate* v. *Thom*, *supra* n. 2; *Manitoba (Public Trustee)* v. *Dukelow*, *supra* n. 2.

[6] *Manitoba (Public Trustee)* v. *Dukelow*, *supra* n. 2, at para. 42.

[7] *The Domicile and Habitual Residence Act*, C.C.S.M. c. D96, s. 8.

[8] See Appendix B.

When the *Thom* case was decided, intestate succession was governed by *The Devolution of Estates Act*.[9] Mr. Thom died domiciled in Saskatchewan, survived by a widow and three children (all the children of himself and his widow). He owned movables and immovables in Saskatchewan, plus immovables in Manitoba valued at $104,600. Under *The Intestate Succession Act* of Saskatchewan[10] (Mr. Thom's *lex domicilii* and the *lex situs* of his Saskatchewan immovables), Mrs. Thom was entitled to a preferential share of $40,000 plus one-third of the remainder of the movable and immovable property located in Saskatchewan. Under *The Devolution of Estates Act* of Manitoba (the *lex situs* of the Manitoba immovables), Mrs. Thom would be entitled to a preferential share of $50,000 of the $104,600 worth of Manitoba immovables, plus one-half of the remaining $54,600, or $77,300 in total. Under conventional conflict of laws rules, Mrs. Thom's entitlement under the two Acts would be cumulative.

The Court did not, however, decide Mrs. Thom's entitlement to the Manitoba immovables this way. Instead, the Court decided that her preferential share of the Manitoba immovables was only $10,000 (not $50,000), to increase her Saskatchewan preferential share of $40,000 to Manitoba's $50,000 preferential entitlement, making the total Manitoba entitlement $57,300 (being $10,000 plus one-half of the remaining $94,600). As a result, Mrs. Thom's total entitlement was reduced by $20,000 compared to what she would have been entitled to according to the conventional dogma.

The decision in *Thom* is no longer directly applicable in Manitoba, because *The Devolution of Estates Act* has been replaced by *The Intestate Succession Act*, and the relevant rules are different. Today, a widow such as Mrs. Thom would be entitled under *The Intestate Succession Act* to the entire estate, since all of Mr. Thom's surviving children were also children of hers. This does not solve the underlying problem, however, as it remains unclear how Manitoba's provisions are to mesh with (in this case) Saskatchewan's. The Commission believes that the problem is best addressed by the adoption of a single choice of law rule.

RECOMMENDATION 60

The Intestate Succession Act ***should provide for a single choice of law rule substantially identical to Article 3 of the Hague Convention [as set out in Appendix B].***

D. SURVIVAL OF BENEFICIARIES

Subsection 6(1) of the Act provides:

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[9] *The Devolution of Estates Act*, R.S.M. 1970, c. D70.

[10] *The Intestate Succession Act*, R.S.S. 1978, c. I-13, s. 4.1, as am. by S.S. 1978 (Supp.) C. 34, s. 4.

Survival for 15 days

6(1) A person who fails to survive the intestate for 15 days, excluding the day of death of the intestate and of the person, shall be treated as if he or she had predeceased the intestate for purposes of succession under this Act.

For the reasons set out in Chapter 2 preceding Recommendation 33, the Commission is persuaded that *The Intestate Succession Act*, as well as *The Wills Act*, ought to impose a requirement that successors must survive a deceased by 30 days.

RECOMMENDATION 61

The Intestate Succession Act should provide that a successor must survive the deceased by 30 days.

CHAPTER 5

THE MARITAL PROPERTY ACT

A. WAIVER

In the Commission's opinion, those aspects of *The Marital Property Act*[1] dealing with distribution of property on the death of a spouse would be improved with the implementation of the recommendations discussed below.

There are two sections in the Act respecting waiver by a spouse of benefits to which he or she would otherwise be entitled under the Act, namely, subsections 5(1) and 27(3), which provide as follows:

> **Assets disposed of by spousal agreement**
> **5(1)** This Act does not apply to any asset disposed of by a spousal agreement or as to which the Act is made inapplicable by the terms of a spousal agreement, but where a spousal agreement is silent as to an asset this Act if otherwise applicable to the asset applies as if the spousal agreement did not exist.
>
> ....
>
> **Effect of spousal agreement on equalization**
> **27(3)** Notwithstanding section 5, where spouses enter into a spousal agreement before this Part comes into force and one of them dies after this Part comes into force, the surviving spouse has, subject to this Act, the right to an accounting and equalization of assets under this Part, unless the surviving spouse specifically waived or released his or her rights under The Dower Act or this Part in the spousal agreement.

It is not obvious why these two subsections are worded differently from each other. Most significantly, there does not appear to be any reason why subsection 27(3) requires a waiver to refer expressly to Part IV in order for it to take effect, while subsection 5(1) does not require specific reference to the Act. *Pynoo* v. *Pynoo* illustrates the latter point.[2] In that case, the Court held that a term in a spousal agreement that read "[I] will make no claim against ... [my husband] in respect of any property of any kind whatsoever" was sufficient to bring all assets within the spousal agreement under subsection 5(1), even though it did not specifically refer to the Act.

The Commission prefers the wording of subsection 5(1), inasmuch as it provides the court with greater flexibility in determining the intended agreement between a deceased and surviving spouse. Accordingly, it is of the view that the wording in subsection 27(3) should be mo

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[1] *The Marital Property Act*, C.C.S.M. c. M45.

[2] *Pynoo* v. *Pynoo* (1984), 31 Man. R. (2d) 49 (C.A.).

consistent with that of subsection 5(1).

RECOMMENDATION 62

Subsection 27(3) of* The Marital Property Act *should be amended by deleting the requirement that the spousal agreement refer specifically to Part IV of the Act before a waiver of rights takes effect.

B. ENTITLEMENT UNDER *THE INTESTATE SUCCESSION ACT*

Section 38 of the Act purports to deal with the interaction between the Act and *The Intestate Succession Act*.[3] This section provides:

> **Entitlement under Intestate Succession Act**
> **38** Where a surviving spouse is entitled to a share of the estate of the deceased spouse under The Intestate Succession Act, the amount of an equalization payment payable to the surviving spouse from the estate under this Act shall be reduced by the amount of the entitlement of the surviving spouse under The Intestate Succession Act.

Unfortunately, it is not clear how this section is to be implemented in practice. In particular, it is not clear in which order the entitlement under Part IV of *The Marital Property Act* and *The Intestate Succession Act* are to be calculated. Probably the section requires the calculation of a *notional* entitlement under Part IV, then the subtraction of that notional entitlement from the deceased's estate to calculate a *notional* entitlement under *The Intestate Succession Act*. Then the subtraction of *that notional* entitlement from the notional entitlement under Part IV to find the *actual* Part IV entitlement. Finally, the subtraction of the *actual* entitlement from the deceased's estate to calculate an *actual* entitlement under *The Intestate Succession Act*. Needless to say, this is not clear. The Commission is of the opinion that this ambiguity should be clarified.

RECOMMENDATION 63

***Section 38 of* The Marital Property Act *should be amended to clarify the order of calculation of entitlement under that Act and* The Intestate Succession Act.**

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[3] *The Intestate Succession Act*, C.C.S.M. c. I85.

CHAPTER 6

THE DEPENDANTS RELIEF ACT

A. OVERVIEW

On July 1, 1990, *The Dependants Relief Act* came into force,[1] replacing *The Testators Family Maintenance Act*.[2] Whatever the Legislature's intention may have been when it enacted *The Testators Family Maintenance Act* in 1946, after that time it was made to serve several purposes by the Manitoba courts, including: the reasonable provision for the maintenance and support of statutorily defined dependants; the enforcement of a moral obligation of spouses and parents to give a fair share of their estates to the surviving spouse and issue; and the fulfilment of moral claims upon the deceased's estate.

The Dependants Relief Act implemented almost all of the Commission's recommendations in its 1985 Report on *The Testators Family Maintenance Act*,[3] the first of which was to make the sole purpose of the Act the reasonable provision for the maintenance and support of dependants of testators. The Commission has considered *The Dependants Relief Act* in the context of its overall review of succession legislation, and believes that *The Dependants Relief Act* could be significantly improved in several respects.

B. SURVIVING DEPENDANTS WHO DIE

Section 28 of *The Marital Property Act* clearly states that the personal representative(s) of a surviving spouse (who subsequently dies) cannot commence, but can continue, an application for an accounting and equalization of assets. *The Dependants Relief Act*, on the other hand, is silent regarding dependants who subsequently die and, unfortunately, case law in other jurisdictions does not provide definitive guidance as to whether, in similar circumstances, personal representatives of dependants are entitled to either commence or continue applications under the Act. The Commission considers that it would be preferable to make explicit provision for this circumstance.

The sole purpose of the Act, unlike comparable legislation in other provinces, is to take care of the financial needs of dependants. The Act does not recognize a moral obligation of spouses and parents to provide a fair share of their estates to their surviving spouse and children,

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[1] *The Dependants Relief Act*, S.M. 1989-90, c. 42, C.C.S.M. c. D37.

[2] *The Testators Family Maintenance Act*, R.S.M. 1988, c. T50.

[3] Manitoba Law Reform Commission, *The Testators Family Maintenance Act* (Report #63), 1985) [MLRC].

and to dependants who contributed to the creation of the estate or to the welfare of the deceased. Although it could be argued that a dependant's financial need ceases with the dependant's death, there may be some obligations which survive. For example, there may be circumstances where a dependant or some other person has a claim for expenses incurred during the period between the death of the testator and the death of the dependant. In light of our recommendation that a dependant's own support obligations be considered in making an award,[4] there may be circumstances where it will be appropriate for the dependant's estate to continue or commence an application.

In light of these factors, the Commission is of the opinion that personal representatives of deceased dependants ought to be permitted to apply, or continue an application, for relief under the Act.

RECOMMENDATION 64

The Dependants Relief Act ***should be amended to provide that the right to apply or to continue an application for an order of relief under the Act survives the death of a dependant.***

C. SUSPENDING ORDERS FOR CERTAIN DEPENDANTS

Section 3 of *The Dependants Relief Act* permits a dependant to apply to the court to suspend the administration of a deceased's estate, for such time and to such extent as the court may decide. While this provision is no doubt a salutary one, it may not always be adequate.

The comparable provision in *The Testators Family Maintenance Act* permitted such an application by an adult, self-sufficient child of the deceased – in other words, someone who was a "dependant" within the statutory definition, but not actually dependent. In *In re Day Estate*,[5] for example, the applicant was an adult daughter who was not, at the time of the application, in financial need. The residuary beneficiary was St. John's Cathedral. Concerned that the daughter might become financially needy, the Court suspended the distribution of the capital comprising the residue.

The definition of "dependant" in *The Dependants Relief Act*, however, does not include an adult, self-sufficient child of the deceased; in the case of a child over 18 years of age, only a child who is "substantially dependant on the deceased at the time of the deceased's death" is entitled to make an application (section 1). This requirement also applies to other dependants, namely co-habitees (if there is no child of the union), grandchildren, siblings, parents, and grandparents. If

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[4] *Infra* p. 78.

[5] *In re Day Estate* (1953), 61 Man. R. 198 (Q.B.).

these dependants are not "substantially dependant on the deceased at the time of the deceased's death", they may not make an application under *The Dependants Relief Act*, thus precluding a court from considering their possible future needs as the Court did in *Day*.

The Commission is of the opinion that it would be consistent with the spirit of *The Dependants Relief Act* to provide the court with the flexibility to suspend the administration of an estate where the court is satisfied that it would be appropriate to do so to provide for the future needs of persons who are not financially dependent on the deceased at the time of the deceased's death.

RECOMMENDATION 65

The Dependants Relief Act *should permit the court to suspend the administration or distribution of an estate, in whole or in part, on application by persons who, apart from not being substantially dependent on the deceased at the time of death, fit the definition of "dependant" in order to make provision for their possible future needs.*

D. EXCEPTION TO LIMITATION PERIOD FOR APPLICATIONS

Subsections 6(1) and (2) of *The Dependants Relief Act* require that applications under the Act must be made within six months from the grant of probate or administration. Subsection 6(3) permits the court to allow a late application only under certain specific circumstances.

> **Exception**
> **6(3)** The court may allow an application to be made at any time as to the portion of the estate remaining undistributed at the date notice of the application is served on the personal representative if the court is satisfied that,
> (a) the dependant did not know of the death of the deceased until after the expiry of the limitation period;
> (b) the dependant's need for maintenance and support did not arise until after the expiry of the limitation period; or
> (c) circumstances beyond the control of the dependant prevented the dependant from making an application within the limitation period.

The Commission's 1985 Report recommended the restrictions set out in clauses (a) to (c) "[t]o balance the interests of the beneficiary".[5] The Commission has, however, reconsidered its position in this respect.

Like the former *Testators Family Maintenance Act*, comparable legislation in other provinces simply empowers the court to allow a late application "if it considers it just [or proper]"

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[5]MLRC, *supra* n. 3, at 96.

The exceptions listed in subsection 6(3) do not include the two most common reasons for late applications: ignorance of the legislation and procrastination.[7] There have been a total of 27 reported late application cases under Canadian legislation, virtually all of them for one or other of these two reasons. In all but four cases, the Court allowed the late applications, and in two of those four, the refusal to do so seems unduly harsh.[8]

Upon reflection, the Commission considers that the provisions of subsection 6(3) are too narrow, and is of the opinion that subsection 15(2) of the former *Testators Family Maintenance Act* is preferable.

RECOMMENDATION 66

The Dependants Relief Act *should authorize the court to permit a late application whenever it is satisfied that it is just to do so.*

E. STAY OF DISTRIBUTION

Subsection 7(1) of *The Dependants Relief Act* provides that, after an application has been made under the Act and served on the personal representative of the deceased, the personal representative may not proceed with the distribution of the estate until the court has dealt with the application.

In connection with a similar legislative provision, the Supreme Court of Canada in *Gilles v. Althouse*[9] held, in effect, that, whether or not an application has been made under the Act, distribution of the estate is stayed for the duration of the six month limitation period. The Commission believes that *The Dependants Relief Act* would be more helpful to personal representatives if it informed them of this stay of distribution period.

RECOMMENDATION 67

The Dependants Relief Act *should explicitly state that distribution of an estate is stayed for six months to permit beneficiaries to make an appication under the Act.*

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[7]Note, however, that clause (c) would most likely apply if the procrastination is that of a lawyer who, though consulted within the six month period, fails to make the application in a timely manner.

[8]See *Smith v. Hunter* (1993), 126 N.S.R. (2d) 254 (S.C.); and *Eccles v. Stephens* (1994), 99 B.C.L.R. (2d) 171 (S.C.).

[9]*Gilles v. Althouse* (1975), 53 D.L.R. (3d) 410 (S.C.C.).

F. FINANCIAL RESPONSIBILITY OF DEPENDANTS

Section 8 of *The Dependants Relief Act* sets out a non-exclusive list of factors that must be considered by the court when making an order of maintenance and support. One obviously relevant factor that is not included in the list is any financial responsibility that a dependant may have for his or her *own* dependants, such as a child or spouse. The Commission believes that a person's financial responsibilities for dependants should be considered in the calculation of the amount required for that person's maintenance and support and, accordingly, that *The Dependants Relief Act* should explicitly direct the court to take such responsibilities into account.

RECOMMENDATION 68

Section 8 of* The Dependants Relief Act *should require the court to consider the financial responsibility a dependant has for dependants in calculating the maintenance and support required by the dependant.

G. CONFLICT OF LAWS

Section 13 of *The Dependants Relief Act* embodies several recommendations of the Commission's Report on *The Testators Family Maintenance Act*.[10] It reads as follows:

> **Conflict of laws**
> **13(1)** In this section,
> "interest in land" includes a leasehold estate as well as a freehold estate in land, and any other estate or interest in land whether the estate or interest is real or personal property;
>
> "interest in movables" means an interest in tangible or intangible things other than land and includes personal property other than an estate or interest in land.
>
> **Property subject to an order**
> **13(2)** The court may grant an order making provision for a dependant in respect of
> (a) an interest in land situated in Manitoba; and
> (b) an interest in movables, no matter where situated, if the deceased died domiciled in Manitoba.
>
> **Domicile outside Manitoba**
> **13(3)** The court may make an order of provision in respect of an interest in movables situated in Manitoba at the time of the deceased's death if the deceased died domiciled outside Manitoba and
> (a) the law of the deceased's domicile does not provide for an application for maintenance and support under dependants' relief legislation; and
> (b) the dependant in whose favour the order is sought was habitually resident in Manitoba at the time of the deceased's death.

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[10] MLRC, *supra* n. 3, at 101-108.

Domicile outside Manitoba

13(4) When an application is made under this Act in respect of a deceased who died domiciled outside Manitoba leaving an interest in land situated in Manitoba, the court may stay the application pending the conclusion of a dependants' relief proceeding in the jurisdictions in which the deceased died domiciled.

As discussed in Chapters 2 and 4, well established conflict of laws rules prescribe that, on an intestacy, the law governing succession to immovables is the law of the place where the immovables are situated, and the law governing succession to movables is the law of the deceased's domicile at death. As well, issues of succession to immovables can be decided only by the courts of the jurisdiction where the immovables are situated. Dependants' relief legislation affects the intrinsic validity of wills, which is subject to the same rules.[11]

It would therefore seem to follow that, on an application under dependants' relief legislation, the court would apply the law of the forum regarding immovables situated within the court's territorial jurisdiction, and the law of the deceased's domicile at death regarding all movables situated within the court's territorial jurisdiction. Instead, courts have consistently made orders in regard to movables only if the deceased died domiciled within their territorial jurisdiction. As a result, if the deceased died domiciled elsewhere than within the court's territorial jurisdiction, a second application has been required in that other jurisdiction to deal with movables. No court has ever applied the law of a deceased's foreign domicile at death in making an order encompassing movables within the court's territorial jurisdiction, and this is the regime enshrined in section 13 of *The Dependants Relief Act*.[12]

The Commission believes that *The Dependants Relief Act* ought to be amended to bring it into line with well established conflict of laws rules.

RECOMMENDATION 69

Subsection 13(2) of* The Dependants Relief Act *should be repealed and replaced with a provision adopting a single choice of law rule substantially identical to Article 3 of the Hague Convention [as set out in Appendix B].

As noted in Chapter 2, recommendation 37, if the Hague Convention is not adopted, the conflict of laws provisions in *The Dependants Relief Act* should refer to an "interest in immovables" rather than an "interest in land".

Another matter is the case law which provides that a dependant does not have to be either

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[11] C. Harvey, *The Law of Dependants' Relief in Canada* (1999) 179-180.

[12] *Id.*, at 180.

a resident or domiciliary to have status to apply. It would be instructive to codify this case law.[13]

RECOMMENDATION 70

The Dependants Relief Act ***should provide that an applicant need not establish either residence or domicile within Manitoba.***

H. WAIVER

In its 1985 Report, the Commission made 31 recommendations respecting the repeal of *The Testators Family Maintenance Act* and its replacement with *The Dependants Relief Act*. All but two of the recommendations were implemented. One of the recommendations not implemented would have provided that contracting out of the Act does not disqualify an application.[14]

The silence of *The Dependants Relief Act* on this issue is not unique. All but three of the other provincial and territorial Acts are similarly silent.[15] The courts have generally held that a waiver is not disqualifying, but is merely one of the circumstances to be considered by the court.[16] In the recent decision of in *Davids* v. *Balbon Estate*, Schulman J. stated that:

> In my view, this court would shirk its responsibility if it were to give effect to the agreement ... since it is crystal clear that one cannot, in Manitoba, contract out of his or her rights to claim under the *Dependants Relief Act*.[17]

There are strong arguments both for and against giving effect to a waiver. The Commission recognizes the force of the view expressed succinctly by Lysyk J. in *Wagner* v. *Wagner Estate*,[18] writing in the context of a separation agreement:

> Agreements freely negotiated and with the advice of independent legal counsel should, as a general rule, be respected. The parties to such an agreement ought to be able to rely with some confidence

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[13] *Re McAdam* (1925), 35 B.C.R. 547 at 550 (B.C.S.C.); *Re Kwasnak* (1951), 2 W.W.R. (N.S.) 174 (Sask. C.A.); *Hayzel* v. *Alberta (Public Trustee)* (1963), 44 W.W.R. 582 (Alta. T.D.); *Zajac* v. *Zwarycz*, [1965] 1 O.R. 575 (Ont. C.A.); *Re Parkansi* (1966), 56 D.L.R. (2d) 475 (Sask. Q.B.); *Re Quon* (1969), 4 D.L.R. (3d) 702 (Alta. Q.B.); *Re Soroka* (1975), 10 O.R. (2d) 638 (Ont. H.C.); *Beasley* v. *Willett* (1972), 4 N.B.R. (2d) 122 (Man. Q.B.) as cited in Harvey, *supra* n. 11, at 75, fn. 133.

[14] M.L.R.C., *supra* n. 3, at 100.

[15] *Testator's Family Maintenance Act*, R.S.N.S. 1989, c. 465, s. 16(2); *Dependants of a Deceased Person Relief Act*, R.S.P.E.I. 1988, c. D-7, s. 16; *Dependants Relief Act*, R.S.Y. 1990, c. 44, s. 17.

[16] See, e.g., *In re Anderson Estate*, [1934] 1 W.W.R. 430 (Alta. S.C.(A.D.)); *In re Lewis Estate*, [1935] 1 W.W.R. 747 (B.C.C.A.); and other decisions cited in Harvey, *supra* n. 11, at 69, fn. 105.

[17] *Davids* v. *Balbon Estate*, [2002] 4 W.W.R. 352 at 359 (Man. Q.B.), affirmed on this point [2002] 9 W.W.R. 1 (Man. C.A.).

[18] *Wagner* v. *Wagner Estate* (1990), 39 E.T.R. 5 at para. 32 (B.C.S.C.), reversed (1991), 44 E.T.R. 24 (B.C.C.A.), leave to appeal to S.C.C. refused (1992), 89 D.L.R. (4th) vii.

> upon its terms in ordering their affairs .... When spouses, through their lawyers, have been at pains to reach a permanent settlement, it would seem appropriate for a court, as well as the parties, to respect their agreement in the absence of compelling reasons to the contrary.

Nevertheless, the Commission adheres to the position taken in its 1985 Report, that it is more appropriate for the court merely to consider an agreement as one factor to be weighed in the balance. The Act should be amended to make it clear to all parties that this is the approach that will be taken by the court.

RECOMMENDATION 71

The Dependants Relief Act *should provide that an agreement or waiver to the contrary will not disqualify an application under the Act, but will be a factor considered by the court in determining the application.*

I. CONTRACTUAL GIFTS

Included in *The Testators Family Maintenance Act* was section 18:

> **18** Where a testator, in his lifetime, bona fide and for valuable consideration, has entered into a contract to devise and bequeath any property, real or personal, and has by his will devised or bequeathed that property in accordance with the provisions of the contract, that property is not liable to the provisions of an order made under this Act except to the extent that the value of the property in the opinion of the judge exceeds the consideration received by the testator therefor.

In its 1985 Report, the Commission made the following observations respecting section 18:

> (a) Property which was the subject matter of a contract should not be liable to an order if there are sufficient other assets in the estate to satisfy a claim.
>
> (b) Contribution from the promisee should not be permitted when (s)he is not privy to an intent on the part of the deceased to evade a claim.
>
> (c) Section 18 does not specify what redress is available if the deceased breached the contract by failing to make a will in accordance with the agreement.[19]

The Commission made a number of recommendations for changes that would, "in our view, improve the operation of section 18 and strike a fairer balance between the competing equities of a contractual promisee and dependants" under *The Testators Family Maintenance Act*.[20] Although virtually all of the other recommendations in our Report were implemented, the

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[19]MLRC, *supra* n. 3, at 112.

[20]MLRC, *supra* n. 3, at 113.

recommendations with respect to section 18 were not.

Indeed, section 18 itself was not carried over into the new legislation.[21] Consequently, when a court is faced with the kind of situation that section 18 used to address, it must decide which of two apparently contradictory precedents it will follow: *Dillon* v. *Public Trustee of New Zealand*[22] or *Schaefer* v. *Schuhman*.[23] In the former case, the Privy Council held that the contracting party was in the same position as any other beneficiary, and hence was subject to the dependants' claims. In the latter case, the Privy Council held that the contracting party was *not* subject to those claims.

The Commission considers this situation highly unsatisfactory and, on reviewing the current state of the law, is of the opinion that the recommendations set out in its 1985 Report remain sound and highly desirable. These are restated below.

RECOMMENDATION 72

Subject to Recommendation 73, where a person has entered into an enforceable contract to devise property by will, the court may order that the rights of the promisee to the contract, whether or not the person complied with the agreement, be subject to an order under the Act provided the court is satisfied that:

- ***(a) the value of the property exceeds the value of the consideration received by the person in money or money's worth;***
- ***(b) the person entered into the contract with the intention of removing property from his/her estate in order to reduce or defeat a claim under the Act;***
- ***(c) the promisee to the contract had actual or constructive notice of this intent; and***
- ***(d) there would be insufficient assets in the estate to make reasonable provision for the maintenance and support for a dependant after the transfer of the property which the deceased agreed to leave by will.***

RECOMMENDATION 73

In exercising its power in relation to a contract to leave property by will, the

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[21] This is so despite the fact that every other common law jurisdiction in Canada (except B.C.) has a provision in its dependants relief legislation almost identical to the former section 18: *Family Relief Act*, R.S.A. 2000, c. F-5, s. 12; *Provision for Dependants Act*, R.S.N.B. 1973, c. P-22.3, s. 16; *Family Relief Act*, R.S.N. 1990, c. F-3, s. 16; *Dependants Relief Act*, R.S.N.W.T. 1988, c. D-4, s. 14 (also applies to Nunavut); *Testators' Family Maintenance Act*, R.S.N.S. 1989, c. 465, s. 16(1); *Succession Law Reform Act*, R.S.O. 1990, c. S-26, s. 71; *Dependants of a Deceased Person Relief Act*, R.S.P.E.I. 1988, c. D-7, s. 14; *Dependants' Relief Act*, 1996, S.S. 1996, c. D-25.01, s. 10; *Dependants Relief Act*, R.S.Y. 1990, c. 44, s. 15.

[22] *Dillon* v. *Public Trustee of New Zealand*, [1941] A.C. 294 (P.C.).

[23] *Schaefer* v. *Schuhman*, [1972] A.C. 572 (P.C.).

court ensure that any order will not deprive the promisee of the right to receive property or to recover damages for the breach of the contract in an amount which is at least equal to the value of the consideration received by the deceased in money or money's worth.

RECOMMENDATION 74

In determining whether the value of the property exceeds the value of the consideration received by the deceased and in what manner to exercise its powers, the court should have regard to:

- ***(a) the value of the property and the value of the consideration at the date of the contract;***
- ***(b) the reasonable expectations of the parties as to the life expectancy of the deceased at the date of the contract;***
- ***(c) if the property was not ascertained at the date of the contract, the reasonable expectations of the parties as to its likely nature and extent; and***
- ***(d) if the consideration was a promise, the reasonable expectations of the parties as to that which would be delivered under the promise.***

J. ANTI-AVOIDANCE PROTECTION

In its 1985 Report, the Commission also considered the desirability of including anti-avoidance provisions in the replacement for *The Testators Family Maintenance Act*.[24] The Commission decided against a general recommendation that the Act be "buttressed by anti-avoidance measures," on the basis that effective protection was best achieved through the operation of a deferred sharing regime on death.[25]

The Commission has revisited this issue and, with the benefit of hindsight, is of the opinion that anti-avoidance provisions may indeed serve a useful purpose in *The Dependants Relief Act*. Dependants relief legislation in Ontario, Prince Edward Island, the Northwest Territory, Nunavut, and the Yukon Territory contains anti-avoidance provisions,[26] and appears to be functioning satisfactorily in this regard. Further, while the anti-avoidance provision in *The Marital Property Act* protects an equalization payment, the lack of an anti-avoidance provision in *The Dependants Relief Act* can defeat a surviving spouse with an entitlement to additional relief under that Act.

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[24] MLRC, *supra* n. 3, at 108 *et seq*.

[25] MLRC, *supra* n. 3, at 110.

[26] *Succession Law Reform Act*, R.S.O. 1990, c. S-26, s. 72; *Dependants of a Deceased Person Relief Act*, R.S.P.E.I. 1988, c. D-7, s. 19; *Dependants Relief Act*, R.S.N.W.T. 1988, c. D-4, s. 19 (which applies in Nunavut); *Dependants Relief Act*, R.S.Y. 1990, c. 44, s. 20.

Given the length andcomplexity of the anti-avoidance provisions, we believe it satisfactory to recommend adoption of legislation similar to that contained in the Ontario Act. Although not reproduced in the followingrecommendation, these provisions are reflected in the draft amending Act (see Appendix A, Part 4, section 21).

RECOMMENDATION 75

That* The Dependants' Relief Act *include anti-avoidance provisions similar to those of section 72 of the* Succession Law Reform Act *of Ontario.

K. MORALITY-BASED AWARDS

It has been suggested that *The Dependants Relief Act* ought to be amended to empower the court to award relief to dependants who have provided services to the deceased in expectation of payment, or who have signficantly assisted the deceased in the acquisition or maintenance of his or her estate.[27] It has been argued that granting the courts the jurisdiction to make such morality-based awards would be a salutary advantage for dependants, compared to other providers, because the award can be given priority over creditors of the estate.

However, it is unlikely that *The Dependants Relief Act* does, in fact, empower the court to give an award such priorityand, in any event, it would likely be unfair to other providers to give dependent providers such priority. Further, it would be undesirable to allow two lines of case law to develop, potentially differentiating the entitlement of *Dependants Relief Act* dependent providers from that of other providers. For these reasons, and because we remain of the view that an emphasis on the moral duty of the testator obscures the basic function of the statute, the Commission is opposed to the notion of empowering the courts to make such morality-based awards.[28]

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[27] D. Kreel, "The Judicial Reconstruction of Wills in Manitoba", (unpublished LL.M. thesis, University of Manitoba, 1999) 95-104.

[28] MLRC, *supra* n. 3, at 23.

CHAPTER 7

THE TRUSTEE ACT

A. SUCCEEDING EXECUTOR

The law of Manitoba is unclear about what happens in circumstances where an executor dies before completing the administration of an estate, and the will does not appoint a succeeding executor. At common law, the executor of an executor assumes the office, if necessary.[1] In Ontario, the common law has been codified in subsection 46(2) of *The Trustee Act*, which reads as follows:

> 46(2) Until the appointment of new personal representatives, the personal representatives or representative for the time being of a sole personal representative, or, where there were two or more personal representatives, of the last surviving or continuing personal representative, may exercise or perform any power or trust that was given to, or capable of being exercised by the sole or last surviving personal representative.[2]

Manitoba's *Trustee Act*[3] does not include a comparable provision. The uncertainty about the law in Manitoba arises because of subsection 6(4) of the Act, which states:

> **Executor of an executor not included**
> **6(4)** The executor of any person appointed an executor under this Act is not, by virtue of such executorship, an executor of the estate of which his testator was appointed executor under this Act, whether the person acted alone or was the last survivor of several executors.

Unfortunately, it is not clear from the wording of the provision whether "the executor *of any person appointed an executor under this Act*" means that subsection 6(4) only supersedes the common law with respect to an executor appointed under subsection 9(1) of *The Trustee Act* or whether it supersedes the common law with respect to *all* executors.

The inclusion in the *Queen's Bench Rules* of a provision allowing beneficiaries to nominate a replacement for an executor who has died intestate[4] tends to support the view that subsection 6(4) only applies to executors appointed under *The Trustee Act*. Surely a similar provision respecting an executor who dies testate would have been included in the *Rules* if the common law was

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[1] R. Hull and I.M. Hull, *Macdonell, Sheard and Hull on Probate Practice* (4th ed., 1996) 160 and *Feeney's Canadian Law of Wills* (4th ed., 2000) 7.52 and 8.7. The latter author states at 7.52 that "there is no need of a fresh grant".

[2] *The Trustee Act*, R.S.O. 1990, c. T-23.

[3] *The Trustee Act*, C.C.S.M. c. T160.

[4] *Court of Queen's Bench Rules*, Man. Reg. 553/88, Rule 74.05(3).

thought not to apply in such circumstances.

Given the wording of subsection 6(4) of *The Trustee Act* and the provision in the *Queen's Bench Rules* which contemplates the nomination of a replacement executor only in circumstances where an executor dies intestate, the Commission is of the view that subsection 6(4) of *The Trustee Act* only supersedes the common law in respect to executors appointed under that Act. This means that executors not appointed under *The Trustee Act* who die before discharging their obligations under a will are, in accordance with the common law, automatically replaced by their own executors.

The virtue of the common law rule, and in the Commission's opinion its only virtue, is that it prevents a hiatus in the executorship, which can be critical where the estate includes volatile assets. Its most significant shortcoming is that its application can result in someone becoming the executor of the estate of a deceased person with whom the executor had no relationship, or opportunity to establish the trust and confidence involved in the selection of an executor. The position of executor is undoubtedly "an office of personal trust".[5] This being the case, the Commission believes that, while the common law rule is desirable insofar as it prevents a hiatus in the executorship, it should nonetheless be modified so that someone known to a deceased person is most apt to become executor of his or her estate.

RECOMMENDATION 76

The Trustee Act ***should be amended to provide that where the last surviving named or appointed executor of an estate dies, his or her executor automatically steps into his or her shoes as executor, but only until***

(a) an administrator with will annexed is appointed; or

(b) six months have elapsed, whichever occurs first.

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[5] J.H.G. Sunnucks, J.G. Ross Martyn and K.M. Garnett, eds., *Williams, Mortimer & Sunnucks on Executors, Administrators and Probate* (17th ed., 1993) 43.

CHAPTER 8

COURT OF QUEEN'S BENCH RULES

One final area in which Manitoba's succession legislation could be improved is the *Court of Queen's Bench Rules* that apply specifically to matters involving succession.

A. SUSPICIOUS CIRCUMSTANCES

Queen's Bench Rule 74.02(10)[1] codifies the common law "doctrine of suspicious circumstances":

> **Suspicious circumstances**
> **74.02(10)** Where words in a will that might have been of importance have been erased or obliterated or where the appearance of the will indicates an attempted cancellation by burning, tearing, or the like, or where any suspicious circumstances exist, probate shall not be granted until all such matters have been explained to the satisfaction of a judge.

This provision is curious and somewhat misleading insofar as the two examples it cites are not the most common situations that invoke the doctrine of suspicious circumstances; indeed, they are quite *un*common.

The doctrine of suspicious circumstances[2] applies to any "well-grounded" suspicion respecting any of the requirements for a valid will, namely: testamentary intention; capacity; knowledge and approval; due form (with respect to holograph documents); and due execution. The most common suspicious circumstances are lack of mental capacity and lack of knowledge and approval when someone interested in the will has been instrumental in its making.

The Commission believes that Rule 74.02(10) would be less misleading, and therefore more instructive, if it referred simply to "any suspicious circumstances", i.e., if the references to specific examples of suspicious circumstances were removed.

RECOMMENDATION 77

Rule 74.02(10) of the* Queen's Bench Rules *should be amended by deleting the references to specific examples of suspicious circumstances.

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[1] *Court of Queen's Bench Rules*, Man. Reg. 553/88.

[2] As recently discussed in *Vout* v. *Hay*, [1995] 2 S.C.R. 876.

CHAPTER 9

LIST OF RECOMMENDATIONS

1. *The Wills Act* should provide a complete, consolidated listing of the fundamental requirements for a valid will. (p. 5)

2. The Act should provide that a will is valid if it appears that the testator intended by his signature to give effect to the will. (p. 6)

3. The Act should provide that a person signing a will on behalf of a testator may sign the testator's name, his or her own name, or both names. (p. 7)

4. The Act should provide that a will is validly executed even if any or all of the witnesses did not know that it was a will. (p. 8)

5. The Act should provide that, if the first witness signs the will in the presence of the testator only, he or she need only acknowledge his or her signature to the second witness in the presence of the testator. (p. 8)

6. Privileged wills should no longer be valid but provision should be made that those in existence at the time of the coming into force of the new legislation remain valid. (p. 10)

7. The age at which a person can make a valid will should be set at 16 years. (p. 11)

8. "Handwriting" should be defined in the Act to include mouthwriting, footwriting, and similar kinds of writing. (p. 11)

9. The Act should prohibit the admission to probate of wills that exist only in electronic form. (p. 15)

10. The Act should provide that a handwritten postscript on a holograph will apparently written at the same time as the will is not invalidated if it appears the testator intended the writing to be part of the will. (p. 15)

11. The Act should provide that, subject to the requirements of *The Queen's Bench Rules* and *The Court of Queen's Bench Surrogate Practice Act*, a will need not be dated and need not include either a testimonium clause or an attestation clause. (p. 16)

2. The Act should provide that a will is invalid if a person who attested it was incompetent as a witness at the time of attestation, but not if the person became incompetent only after attesting it. (p. 17)

3. The Act should provide that any person competent to make a will, other than a person unable to see sufficiently to attest the testator's signature and a person who signs a will on behalf of the testator, can act as a witness to a will. (p. 17)

4. The Act should provide that a will is not revoked by the marriage of the testator where it appears from the will, or from extrinsic evidence, that the will was made in contemplation of the marriage. (p. 22)

5. The Act should provide that a will is not revoked by the marriage of the testator where either the will or a part of the will was made in contemplation of the marriage. (p. 22)

6. The Act should provide that no obliteration, interlineation, cancellation by the writing of words of cancellation or by drawing lines across a will, or any part of a will, made after execution of a will, is valid or has any effect except to the extent that the words or effect of the will before the alteration are not apparent unless the alteration is executed in accordance with this Act. (p. 26)

7. The Act should provide that the alteration is properly executed if the signature of the testator and the subscription of the witnesses are made:
   (a) in the margin or in some part of the will opposite or near to the alteration; or
   (b) at the foot or end of or opposite to a memorandum referring to the alteration and written at the end or in some other part of the will. (p. 26)

8. The Act should provide that a will may be obliterated, interlineated, or cancelled by the writing of words of cancellation or by drawing lines across a will or any part of a will by a testator without any requirement as to the presence of or attestation or signature by a witness or any further formality if the alteration is wholly in the handwriting of, and signed by, the testator. (p. 26)

9. The Act should provide that, after the making of a will by a testator and before his or her death, the marriage of the testator is terminated by a divorce judgment or the marriage is found to be void or declared a nullity by a court in a proceeding to which he or she is a party, then, unless a contrary intention appears in the will, the will shall be construed as if the spouse had predeceased the testator. (p. 28)

20. The Act should stipulate that a life estate *pur autre vie* with a spouse as a *cestui que vie* will not survive the termination of a marriage, unless a contrary intention appears in the will. (p. 29)

21. The Act should treat beneficiary designations in favour of a spouse, whether designations of insurance proceeds or pension proceeds, in the same manner as other devises or bequests. (p. 29)

22. The provisions of the Act dealing with revocation of a will upon marriage should not apply in the event of a subsequent marriage to the former spouse. (p. 30)

23. References to "a decree absolute of divorce" should be replaced with a reference to "a divorce judgment". (p. 30)

24. The Act should explicitly permit the revival of wills that have been revoked by destruction if copies or adequate evidence is available to the court to reconstruct the will. (p. 31)

25. The Act should provide that, except when a contrary intention appears by the will, where a testator (or his or her estate) before, at the time of, or after his or her death
    (a) made an agreement to dispose of specifically gifted property but the agreement was not fully implemented at the time of death;
    (b) sold specifically gifted property and has taken back a mortgage, charge or other security;
    (c) has a right to receive insurance proceeds covering loss of or damage to specifically gifted property;
    (d) has a right to receive compensation for the expropriation of specifically gifted property;

    the devisee or donee of that property is entitled to the proceeds of disposition, mortgage, charge or security interest, insurance proceeds or compensation. (p. 34)

26. The Act should provide that, except where a contrary intention appears by the will, where the testator has bequeathed proceeds of sale of property and the proceeds are received by the testator before his or her death, the bequest is not adeemed by commingling the proceeds where those proceeds can be traced. (p. 36)

27. The provision of the Act dealing with property disposed of by committee or substitute decision maker should include an attorney acting pursuant to an enduring power of attorney under *The Powers of Attorney Act*. (p. 36)

28. The Act should provide that, where a gift fails and the testator has designated an alternative beneficiary, the gift should be distributed to that alternative beneficiary, notwithstanding that it fails for a reason other than that contemplated by the testator. (p. 37)

29. Section 25 of the Act [new draft s. 23] should be renumbered subsection (1) and a new subsection (2) should be added, reading substantially as follows:

    Exception

    25(2) [new draft s. 23(2)] Subsection (1) does not apply to a

residuary devise or bequest that fails or becomes void. (p. 38)

30. The Act should provide that the relevant date for identifying beneficiaries is the date of the testator's death. (p. 40)

31. Section 25.2 of the Act [new draft s. 25] should apply in any case where a gift to a child, other issue, or sibling of the testator fails, regardless of the reason. (p. 40)

32. Section 25.2 of the Act [new draft s. 25] should be applicable only when the person dies *after* the testator makes the will. (p. 41)

33. The Act should provide that, unless a contrary intention appears in the will, if a beneficiary fails to survive the testator by 30 days, any gifts to that beneficiary should be distributed as if the beneficiary had predeceased the testator. (p. 42)

34. Section 36 of the Act [new draft s. 37] should apply to both real and personal property. (p. 43)

35. The definition of "mortgage" in the Act should include only mortgages and charges related to the acquisition, use, or improvement of the particular land or chattel. (p. 43)

36. The Act should impose a single set of conflict of laws rules for both movables and immovables, modeled on Articles 3, 5-7 and 17 of the *Hague Convention* [as set out in Appendix B], and guided by the principle behind subsection 42(2) of the current Act. (pp. 44-45)

37. If the *Hague Convention* is not adopted, the conflict of laws provisions in *The Wills Act* and *The Dependants Relief Act* should refer to an "interest in immovables" rather than an "interest in land". (p. 45)

38. The conflict of laws provisions of the Act should refer to "formal and intrinsic validity" rather than "the manner and formalities of making a will". (p. 45)

39. The conflict of laws rules provisions should include the testator's capacity. (p. 46)

40. A provision similar to clause 42(2)(b) of the current Act should include any writing made in accordance with the Act declaring an intention to revoke an existing will. The clause should also expressly provide that the testator's capacity to make the later will must also conform to the relevant law. (p. 46)

41. The Act ought to include a single set of conflict of laws rules relating to the revocatory effect of the destruction of a will. (p. 46)

42. The Act should include a set of conflict of laws rules relating to the revocatory effect of a subsequent marriage, divorce and annulment, for both movables and immovables, with domicile and habitual residence (as defined in *The Domicile and Habitual Residence Act*) at the time of the marriage, divorce and annulment being the relevant connecting factor. (p. 47)

43. The Act should codify, in their entirety, the common law choice of law rules regarding construction of wills, substituting "domicile and habitual residence" (as defined in *The Domicile and Habitual Residence Act*) for "domicile" as the connecting factor. (p. 47)

44. The Act should provide that an *inter vivos* gift to a child by a parent is presumed not to be an advancement. (p. 48)

45. The Act should provide that, if a court is satisfied that a will is so expressed that it fails to carry out the testator's intentions, in consequence of
    (a) an error arising from an accidental slip or omission;
    (b) a misunderstanding of the testator's instructions;
    (c) a failure to carry out the testator's instructions; or
    (d) a failure by the testator to appreciate the effect of the words used;
    it may order that the will be rectified. (p. 55)

46. The Act should provide that, where any part of a will is meaningless or ambiguous either on its face or in the light of evidence (other than evidence of the testator's intention), extrinsic evidence, including statements made by the testator or other evidence of his intent, may be admitted to assist in its interpretation, which interpretation shall be preferred to one resulting from the application of a rule of construction. The legislation should also include a provision stating that the new rule should not render inadmissible extrinsic evidence that is otherwise admissible by law. (p. 57)

47. Where it is deemed appropriate to do so, provisions which contain the words "subject to a contrary intention appearing by the will" should also include the words "or from other relevant evidence". (p. 57)

48. The Act should provide that where a testator devises or bequeaths property in terms which in themselves would give an absolute interest to one person but by the same instrument purports to give another person an interest in the same property, the gift to the first person is absolute notwithstanding the purported gift to the second person. (p. 60)

49. *The Law of Property Act* should provide that, for the payment of unsecured debts, funeral expenses, and the costs of administering the estate, the order in which assets are used shall be:
    (a) assets specifically charged with the payment of debts or left on trust for the payment of debts;

(b) assets passing by way of intestacy and residue;
(c) assets comprising general gifts;
(d) assets comprising specific and demonstrative gifts;
(e) assets over which the deceased had a general power of appointment that has been expressly exercised by will. (p. 62)

50. *The Law of Property Act* should provide that each class should include both personal property and real property, and no distinction should be made between the two types of property within a given class. (p. 63)

51. *The Law of Property Act* should provide that each asset within a given class should contribute rateably to payment of debts. (p. 63)

52. *The Law of Property Act* should provide that, to charge property with payment of debts or to create a trust for payment of debts, a testator must do something more than:
(a) give a general direction that debts be paid;
(b) give a general direction that the executor pay the testator's debts; or
(c) impose a trust that the testator's debts be paid. (p. 63)

53. *The Law of Property Act* should provide that the statutory order of application of assets may be varied by the will of the testator. (p. 63)

54. *The Wills Act* should provide that residuary personalty and realty are equally available for the fulfilment of general bequests, including legacies and demonstrative legacies. (p. 64)

55. *The Wills Act* should provide that real property charged with the payment of debts or pecuniary gifts is primarily liable for that purpose, notwithstanding a failure by the testator to exempt his or her personal property. (p. 64)

56. Subsection 41(2) of *The Family Property Act* and subsection 12(1) of *The Dependants Relief Act* should be repealed and replaced with provisions imposing the same abatement regime that governs the payment of debts, funeral expenses, and costs of administering the estate, subject to a contrary testamentary direction. (p. 65)

57. *The Intestate Succession Act* should expressly stipulate that the only ascendant and collateral blood relatives who are entitled to succeed shall be those up to and including great grandparents and their issue. (p. 66)

58. Section 8 of *The Intestate Succession Act* ought to apply equally to cases of whole and partial intestacies. (p. 67)

59. Section 8 of *The Intestate Succession Act* should treat as an advancement a gift declared by the testator to be an advancement, regardless of when the declaration is made. (p. 67)

60. *The Intestate Succession Act* should provide for a single choice of law rule substantially identical to Article 3 of the *Hague Convention* [as set out in Appendix B]. (p. 70)

61. *The Intestate Succession Act* should provide that a successor must survive the deceased by 30 days. (p. 71)

62. Subsection 27(3) of *The Marital Property Act* should be amended by deleting the requirement that the spousal agreement refer specifically to Part IV of the Act before a waiver of rights takes effect. (p. 73)

63. Section 38 of *The Marital Property Act* should be amended to clarify the order of calculation of entitlement under that Act and *The Intestate Succession Act*. (p. 73)

64. *The Dependants Relief Act* should be amended to provide that the right to apply or to continue an application for an order of relief under the Act survives the death of a dependant. (p. 75)

65. *The Dependants Relief Act* should permit the court to suspend the administration or distribution of an estate, in whole or in part, on application by persons who, apart from not being substantially dependent on the deceased at the time of death, fit the definition of "dependant" in order to make provision for their possible future needs. (p. 76)

66. *The Dependants Relief Act* should authorize the court to permit a late application whenever it is satisfied that it is just to do so. (p. 77)

67. *The Dependants Relief Act* should explicitly state that distribution of an estate is stayed for six months to permit beneficiaries to make an application under the Act. (p. 77)

68. Section 8 of *The Dependants Relief Act* should require the court to consider the financial responsibility a dependant has for dependants in calculating the maintenance and support required by the dependant. (p. 78)

69. Subsection 13(2) of *The Dependants Relief Act* should be repealed and replaced with a provision adopting a single choice of law rule substantially identical to Article 3 of the *Hague Convention* [as set out in Appendix B]. (p. 79)

70. *The Dependants Relief Act* should provide that an applicant need not establish either residence or domicile within Manitoba. (p. 80)

71. *The Dependants Relief Act* should provide that an agreement or waiver to the contrary will

not disqualify an application under the Act, but will be a factor considered by the court in determining the application. (p. 81)

72. Subject to Recommendation 73, where a person has entered into an enforceable contract to devise property by will, the court may order that the rights of the promisee to the contract, whether or not the person complied with the agreement, be subject to an order under the Act provided the court is satisfied that:
    (a) the value of the property exceeds the value of the consideration received by the person in money or money's worth;
    (b) the person entered into the contract with the intention of removing property from his/her estate in order to reduce or defeat a claim under the Act;
    (c) the promisee to the contract had actual or constructive notice of this intent; and
    (d) there would be insufficient assets in the estate to make reasonable provision for the maintenance and support for a dependant after the transfer of the property which the deceased agreed to leave by will. (p. 82)

73. In exercising its power in relation to a contract to leave property by will, the court ensure that any order will not deprive the promisee of the right to receive property or to recover damages for the breach of the contract in an amount which is at least equal to the value of the consideration received by the deceased in money or money's worth. (pp. 82-83)

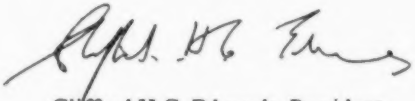
74. In determining whether the value of the property exceeds the value of the consideration received by the deceased and in what manner to exercise its powers, the court should have regard to:
    (a) the value of the property and the value of the consideration at the date of the contract;
    (b) the reasonable expectations of the parties as to the life expectancy of the deceased at the date of the contract;
    (c) if the property was not ascertained at the date of the contract, the reasonable expectations of the parties as to its likely nature and extent; and
    (d) if the consideration was a promise, the reasonable expectations of the parties as to that which would be delivered under the promise. (p. 83)

75. That *The Dependants' Relief Act* include anti-avoidance provisions similar to those contained in section 72 of the *Succession Law Reform Act* of Ontario. (p. 84)

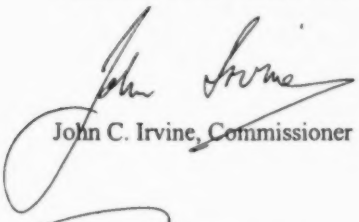
76. *The Trustee Act* should be amended to provide that where the last surviving named or appointed executor of an estate dies, his or her executor automatically steps into his or her shoes as executor, but only until
    (a) an administrator with will annexed is appointed; or
    (b) six months have elapsed, whichever occurs first.(p. 86)

77. Rule 74.02(10) of the *Queen's Bench Rules* should be amended by deleting the references to specific examples of suspicious circumstances. (p. 87)

This is a Report pursuant to section 15 of *The Law Reform Commission Act*, C.C.S.M. c. L95, signed this 11th day of March 2003.

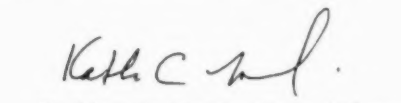


Clifford H.C. Edwards, President



John C. Irvine, Commissioner

Gerald O. Jewers, Commissioner



Kathleen C. Murphy, Commissioner

Alice R. Krueger, Commissioner

APPENDIX A

DRAFT LEGISLATION AND REFERENCE NOTES

DRAFT OF A NEW WILLS ACT

HER MAJESTY, by and with the advice and consent of the Legislative Assembly of Manitoba, enacts as follows:

Definitions

1 In this Act,

"common law partner" of a testator means, except in sections [8, 9 and 10],

(a) a person who, with the testator, registers a common-law relationship under section 13.1 of The Vital Statistics Act, or

(b) a person who, not being married to the testator is cohabiting or has cohabited with him or her in a conjugal relationship, commencing either before or after the coming into force of this definition,

(i) for a period of at least three years, or

(ii) for a period of at least one year and they are together the parents of a child;

Enacted by *The Common-Law Partners' Property and Related Amendments Act*, S.M. 2001-2002, c. 48, Royal Assent August 9, 2002 (yet to be proclaimed). References to section numbers have been amended to accord with the draft Act.

"court" means the Court of Queen's Bench.

"handwriting" includes footwriting, mouthwriting, and writing of a similar kind.

Implements recommendation 8 (see p. 11).

"will" includes a testament, a codicil, an appointment by will or by writing in the nature of a will in exercise of a power and any other testamentary disposition.

Property disposable by will

Mirrors current section 2.

2 A person may by will devise, bequeath or dispose of all real and personal property (whether acquired before or after the making of the will), to which at the time of death of the testator, the testator is entitled either at law or in equity, including

(a) estates pur autre vie, whether there is or is not a special occupant and whether they are corporeal or incorporeal hereditaments;

b) contingent, executory or other future interests in real or personal property, whether the testator is or is not ascertained as the person or one of the persons in whom those interests may respectively become vested, and whether the testator is entitled to them under the instrument by which they were respectively created or under a disposition of them by deed or will; and

(c) rights of entry.

Writing required

3(1) A will is not valid unless

(a) it is in writing;

(b) subject to section 4,

  (i) it is signed by the testator or by some other person in the presence and by the direction of the testator; and

  (ii) it appears that the testator intended by his signature to give effect to the will; and

  (iii) the signature is made or acknowledged by the testator in the presence of two or more witnesses present at the same time; and

(c) at the time of making the will, the testator has attained the age of 16 years or has been married;

(d) at the time of making the will the testator is of sound mind, memory and understanding;

(e) the testator intends the will to be a deliberate or fixed and final expression of intention as to the disposal of property upon death; and

(f) the testator is aware of, and approves, the contents of the will.

Provides a complete, consolidated listing of the fundamental requirements for a valid will. It replaces current sections 3, 4, 7 and 8 and implements recommendations 2 and 7 (see pp. 5-6 and 10-11).

Signature by other person

3(2) For the purpose of sub-clause (1)(b)(i), the other person may sign the testator's name, his own name, or both.

Implements recommendation 3 (see pp. 6-7). There is no comparable section in the current Act.

Witnesses' knowledge and presence

3(3) For the purposes of sub-clause (1)(b)(iii),

(a) the witnesses need not be aware that the document the testator is signing is a will; and

(b) it is satisfactory if the testator and a witness sign the will in the presence of each other and subsequently acknowledge their signatures to a second witness, who then signs the will.

Implements recommendations 4 and 5 (see pp. 7-8). There is no comparable section in the current Act.

Privileged wills

3(4) Privileged wills in existence at the time of coming into force of this Act are valid.

Replaces section 5 of the current Act and implements recommendation 6 (see pp. 8-10).

Revocation by infants

3(5) A person who has made a will under sub-clause (1)(c) may revoke the will while under the age of 16 years.

Replaces current subsection 8(3) and implements recommendation 7 (see pp. 10-11).

Holograph will

4(1) A person may make a valid will wholly in the person's own handwriting and signed by the person, without formality, and without the presence of, or attestation or signature by a witness, if it is apparent on the face of the will that the person intended to give effect by the signature to the writing signed as the person's will.

Replaces current section 6 and implements recommendations 2 and 10 (see pp. 5-6 and 15).

Will exercising power of appointment

5 A will made in accordance with this Act is, so far as respects the execution and attestation thereof, a valid execution of a power of appointment by will notwithstanding that it has been expressly required that a will in exercise of the power be executed or attested with some additional or other form of execution or attestation or solemnity.

Mirrors current section 9.

Publication

6 Subject to the requirements of *The Court of Queen's Bench Surrogate Practice Act* and *The Court of Queen's Bench Rules*, a will made in accordance with this Act is valid without

(a) other publication;
(b) a date;
(c) a testimonium clause; or
(d) an attestation clause.

Replaces current section 10 and implements recommendation 11 (see p. 16).

Witness eligibility

7(1) Any person who is competent to make a will is competent to act as a witness for the purposes of section 3, unless

(a) their vision is so impaired that they cannot see to attest the testator's signature; or

(b) they sign the will on behalf of the testator.

Implements recommendation 13 (see pp. 16-17). There is no comparable section in the current Act.

Incompetency of witness

7(2) Where a person who attested a will has afterward become incompetent as a witness to prove its execution, the will is not on that account invalid.

Replaces current section 11 and further implements recommendation 13 (see pp. 16-17).

Definition of "common-law partner"

8(1) *For the purpose of this section and sections 9 and 10, "common law partner" of a person means*

(a) another person who, with the person, registers a common-law relationship under section 13.1 of The Vital Statistics Act, and who is cohabiting with the person, or

(b) another person who, not being married to the person is cohabiting with him or her in a conjugal relationships of some permanence.

As enacted S.M. 2001-2002, c. 48, Royal Assent August 9, 2002 (yet to be proclaimed).

Gift to attesting witness

8(1.*1*) Where a will is attested by a person to whom or to whose then spouse *or common law partner*, a beneficial devise, bequest, or other disposition or appointment of or affecting real or personal property, except charges and directions for payment of debt, is thereby given or made, the devise, bequest, or other disposition or appointment is void so far only as it concerns the person so attesting, or the spouse *or common law partner* or a person claiming under any of them; but the person so attesting is a competent witness to prove the execution of the will or its validity or invalidity.

Mirrors current subsection 12(1), as am. S.M. 2001-2002, c. 48, Royal Assent, August 9, 2002 (yet to be proclaimed).

Attestation by two other witnesses

8(2) Where a will is attested by at least two persons who are not within subsection (1) or where no attestation is necessary, the devise, bequest, or other disposition or appointment is not void under that subsection.

Mirrors current subsection 12(2).

Validation of gifts to witnesses

8(3) Where a person to whom or to whose spouse *or common law partner*, a beneficial devise, bequest or other disposition or appointment of or affecting real or personal property is given or made by a will, attests the will, the court, on application, if satisfied that neither the person nor the spouse *or common law partner* of the person exercised any improper or undue influence upon the testator, may order that, notwithstanding subsection (1), the devise, bequest or other disposition or appointment is valid, and thereupon, the devise, bequest or other disposition or the appointment, as the case may be, is valid and fully effective as though the will had been properly attested by other persons.

Mirrors current subsection 12(3), as am. S.M. 2001-2002, c. 48, Royal Assent, August 9, 2002 (yet to be proclaimed).

Gifts to persons signing for testator

9(1) Where a will is signed for the testator by another person to whom or to whose then spouse *or common law partner*, a beneficial devise, bequest, or other disposition or appointment of or affecting real or personal property, except charges and directions for payment of debt, is thereby given or made, the devise, bequest, or other disposition or appointment is void so far only as it concerns the person so signing or the spouse *or common law partner* or a person claiming under any of them; but the will is not invalid for that reason.

Mirrors current subsection 13(1), as am. S.M. 2001-2002, c. 48, Royal Assent, August 9, 2002 (yet to be proclaimed).

Validation of gifts to signor of will

9(2) Where a person to whom or to whose spouse *or common law partner*, a beneficial devise, bequest or other disposition or appointment of or affecting real or personal property is given or made by a will, signs the will for the testator, the court, on application, if satisfied that neither the person nor the spouse *or common law partner* of the person exercised any improper or undue influence upon the testator may order that notwithstanding subsection (1), the devise, bequest or other disposition or appointment is valid, and thereupon the devise, bequest or other disposition or appointment, as the case may be, is valid and fully effective as though the will had been properly signed by the testator.

Mirrors current subsection 13(2), as am. S.M. 2001-2002, c. 48, Royal assent, August 9, 2002 (yet to be proclaimed).

Creditor as witness

10 Where real or personal property is charged by a will with a debt and a creditor or the spouse *or common law partner* of a creditor whose debt is so charged attests the will, the person so attesting, notwithstanding such charge, is a competent witness to prove the execution of the will or its validity or invalidity.

Mirrors current section 14, as am. S.M. 2001-2002, c. 48, Royal Assent August 9, 2002 (yet to be proclaimed).

Executor as witness

11 A person is not incompetent as a witness to prove the execution of a will, or its validity or invalidity solely because he is an executor.

Mirrors current section 15.

Revocation is general

12 A will or part of a will is not revoked except as provided in subsection 14(2) *or (4)* or

(a) subject to section 13, by the marriage of the testator; or

(b) by a later will valid under this Act; or

(c) by a later writing declaring an intention to revoke it and made in accordance with the provisions of this Act governing the making of a will; or

(d) by burning, tearing or otherwise destroying it by the testator or by some person in the presence and by the direction of the testator with the intention of revoking it.

Mirrors current section 16, as am. S.M. 2001-2002, c. 48, Royal Assent August 9, 2002 (yet to be proclaimed). The section number in clause (a) has been changed to accord with the draft Act.

Revocation by marriage

13 A will is revoked by the marriage of the testator except where

(a) it appears from the will or from part of it, or from extrinsic evidence, that it was made in contemplation of the marriage; or

(a.1) there is a declaration in the will that it is made in contemplation of the testator's common-law relationship with the person the testator subsequently maries; or

(b) the will is made in exercise of a power of appointment of real or personal property which would not, in default of the appointment, pass to the heir, executor, or administrator of the testator or to the persons entitled to the estate of the testator if the testator died intestate or

(c) the will fulfills obligations of the testator to a former spouse or common-law partner under a separation agreement or court order.

Replaces current section 17, as am. S.M. 2001-2002, c. 48, Royal Assent August 9, 2002 (yet to be proclaimed) and implements recommendations 14 and 15 (see pp. 17-22).

Revocation by common-law relationship

13.1 A will is revoked when a person with whom a testator is cohabiting becomes his or her common-law partner except where

(a) the testator lacks capacity to make a new will on the day this section comes into force;

(b) there is a declaration in the will that it is made in contemplation of the testator's common-law relationship;

(c) the testator's common-law partner is a beneficiary under the will;

(d) the will is made in exercise of a power of appointment of real or personal property which would not, in default of the appointment, pass to the heir, executor, or administrator of the testator or to the persons entitled to the estate of the testator if the testator died intestate; or

(e) the will fulfills obligations of the testator to a former spouse or common-law partner under a separation agreement or court order.

As enacted S.M. 2001-2002, c. 48, Royal Assent August 9, 2002 (yet to be proclaimed)

No revocation by presumption

14(1) Subject to sections 13 *and 13.1* and to subsections (2) and (4), a will is not revoked by presumption of an intention to revoke it on the ground of a change in circumstances.

Mirrors current subsection 18(1), as am. S.M. 2001-2002, c. 48, Royal Assent August 9, 2002 (yet to be proclaimed). References to sections numbers have been amended to accord with the draft Act.

Effect of divorce

14(2) Where in a will

(a) devise or bequest of a beneficial interest in property is made to the spouse of the testator; or

(b) the spouse of the testator is appointed executor or trustee; or

(c) a general or special power of appointment is conferred upon the spouse of the testator; or

(d) a life estate pur autre vie is conferred upon a person where the spouse of the testator is the cestui que vie; or

(e) a designation of proceeds of a life insurance policy or pension proceeds is made in favour of a spouse of the testator;

Replaces current subsection 18(2) and implements recommendations 19, 20 and 21 (see pp. 26-29).

and after the making of the will and before the death of the testator, the testator's marriage to that spouse is terminated by divorce or is found to be void or declared a nullity by a court in a proceeding to which the testator is a party, then, except when a contrary intention appears by the will *or from other relevant evidence*, the will shall be construed as if the spouse had predeceased the testator.

The italicized phrase implements recommendation 47 (see pp. 51-57). However, it has not been incorporated into other sections of the Act as we believe this is best left to Legislative Counsel to decide where it is appropriate to do so.

Definition of "spouse"

14(3) In subsection (2), "spouse" includes the person purported or thought by the testator to be the spouse of the testator.

Mirrors current subsection 18(3).

Subsequent remarriage

14(4) Subsection (2) shall cease to apply upon the testator's remarriage to the former spouse, unless and until that marriage is subsequently terminated by divorce or found to be void or declared a nullity by a court in a proceeding to which the testator is a party.

Implements recommendation 22 (see pp. 29-30).
There is no comparable section in the current Act.

Effect of termination of common-law relationship

14(5) *Where in a will*

(a) *a devise or bequest of a beneficial interest in property is made to the common-law partner of the testator;*

(b) *the common-law partner of the testator is appointed executor or trustee; or*

(c) *a general or special power of appointment is conferred on a common-law partner of the testator;*

and after making the will and before the death of the testator, the testator's common-law relationship with his or her common-law partner is terminated

(d) *where the common-law relationship was registered under section 13.1 of The Vital Statistics Act, by registration of the dissolution of the common-law relationship under section 13.2 of The Vital Statistics Act; or*

(e) *where the common-law relationship was not registered under section 13.1 of The Vital Statistics Act, by virtue of having lived separate and apart for a period of at least three years;*

then, unless a contrary intention appears in the will, the devise, bequest, appointment or power is revoked and the will shall be construed as if the common-law partner predeceased the testator.

Enacted S.M. 2001-2002, c. 48, Royal Assent August 9, 2002 (yet to be proclaimed).

Making alterations

15(1) No alternation in the form of obliteration, interlineation, cancellation by the writing of words of cancellation or by drawing lines across a will or any part of a will, made in a will after execution, is valid or has any effect except to the extent that the words or effect of the will before the alteration are not apparent, unless the alteration is executed in accordance with this Act.

Replaces current s. 19 and implements recommendation 16 (see pp. 22-26).

Execution of alterations

15(2) Subject to subsection 3, an alteration is properly executed if the signature of the testator and the subscription of the witnesses are made:

(a) in the margin or in some part of the will opposite or near to the alteration; or

(b) at the foot or end of or opposite to a memorandum referring to the alteration and written at the end or in some other part of the will.

Replaces current s. 19 and implements recommendation 17 (see pp. 22-26).

Alterations in testator's handwriting

15(3) A will may be obliterated, interlineated, or cancelled by the writing of words of cancellation or by drawing lines across it, or any part of it, by a testator without any requirement as to the presence of or attestation or signature by a witness or any further formality if the alteration is wholly in the handwriting of, and signed by, the testator.

Implements recommendation 18 (see pp. 22-26). There is no comparable section in the current Act.

Revival

16(1) A will or part of a will that has been in any manner revoked is revived only

(a) by a will made in accordance with this Act; or

(b) by a codicil that has been made in accordance with this Act

that shows an intention to revive the will or part that was revoked.

Mirrors current subsection 20(1).

Revival of destroyed wills

16(2) A will that has been revoked by destruction pursuant to subsection 12(d) may be revived under subsection (1) only if the court is satisfied that adequate evidence exists to reconstruct the will.

Implements recommendation 24 (see pp. 30-31). There is no comparable section in the current Act.

Partial revival

16(3) Except when a contrary intention is shown, when a will that has been partly revoked and afterward wholly revoked is revived, the revival does not extend to the part that was revoked before the revocation of the whole.

Mirrors current subsection 20(2).

Subsequent conveyance

17(1) A conveyance of, or other act relating to, real or personal property disposed of in a will made or done after the making of a will, does not prevent operation of the will with respect to any estate or interest in the property that the testator had power to dispose of by will at the time of the death of the testator.

Mirrors current section 21.

Incomplete conveyance

17(2) Except when a contrary intention appears by the will, where a testator, or his or her estate, before, at the time of, or after the testator's death,

(a) made an agreement to dispose of specifically gifted property but the agreement was not fully implemented at the time of death;

(b) sold specifically gifted property and has taken back a mortgage, charge or other security;

(C) has a right to receive insurance proceeds covering loss of or damage to specifically gifted property; or

(d) has a right to receive compensation for the expropriation of specifically gifted property;

the devisee or donee of that property is entitled to the proceeds of disposition, mortgage, charge or security interest, insurance proceeds or compensation.

Implements recommendation 25 (see pp. 31-34). There is no comparable section in the current Act.

No ademption by commingling

17(3) Except when a contrary intention appears by the will, where the testator has bequeathed proceeds of the sale of property and the proceeds are received by the testator before the death of the testator, the bequest is not adeemed by commingling the proceeds where the proceeds can be traced.

Implements recommendation 26 (see pp. 34-36). There is no comparable section in the current Act.

Absolute and remainder gifts

18 Where a testator devises or bequeaths property to a person in terms which would themselves give an absolute interest, but by the same instrument purports to devise or bequeath an interest in the same property to a different person, the gift is absolute notwithstanding the purported gift to the second person.

Implements recommendation 48 (see pp. 57-60). There is no comparable section in the current Act.

Time of revival or re-execution

19(1) When a will has been revived or re-executed, the will shall be deemed to have been made at the time at which it was revived or re-executed.

Mirrors current subsection 22(1).

Will speaking from death

19(2) Except when a contrary intention appears by the will, a will speaks and takes effect as if it had been made immediately before the death of the testator with respect to the real and personal property comprised therein.

Mirrors current subsection 22(2).

Dispensation power

20(1) Where, upon application, the court is satisfied that a document or any writing on a document embodies

(a) the testamentary intentions of a deceased; or

(b) the intention of a deceased to revoke, alter or revive a will of the deceased or the testamentary intentions of the deceased embodied in a document other than a will;

the court may, notwithstanding that the document or writing was not executed in compliance with any or all of the formal requirements imposed by this Act, order that the document or writing, s the case may be, be bully effective as though it had been executed in compliance with all the formal requirements imposed by this Act as the will of the deceased or as the revocation, alteration or revival of the will of the deceased or of the testamentary intention embodied in that other document, as the case may be.

Mirrors current section 23.

"Document" defined

20(2) For purposes of this section, "document" does not include information stored solely by electronic means.

Implements recommendation 9 (see pp. 12-15). There is no comparable section in the current Act.

Rectification

21 Where, upon application, the court is satisfied that a will is so expressed that it fails to carry out the testator's intentions, in consequence of

(a) an error arising from an accidental slip or omission;

(b) a misunderstanding of the testator's instructions;

(c) a failure to carry out the testator's instructions; or

(d) a failure by the testator to appreciate the effect of the word used;

the court may order that the will be rectified.

Implements recommendation 45 (see pp. 48-55). There is no comparable section in the current Act.

Extrinsic evidence admissible

22(1) Where any part of a will is meaningless, or ambiguous either on its face or in light of evidence other than evidence of the testator's intention, extrinsic evidence, including statements made by the testator or other evidence of his intent, may be admitted to assist in its interpretation.

Implements recommendation 46 (see pp. 55-57). There is no comparable section in the current Act.

Saving

22(2) Nothing in this section renders inadmissible extrinsic evidence that is otherwise admissible by law.

Implements recommendation 46 (see pp. 55-57). There is no comparable section in the current Act.

Property disposed of by committee or substitute decision maker

23(1) Where the committee for a person, or the substitute decision maker for property for a person appointed under *The Vulnerable Persons Living with a Mental Disability Act*, or an attorney acting pursuant to an enduring power of attorney under *The Powers of Attorney Act* sells, mortgages, exchanges or otherwise disposes of any property, real or personal, of the person, the devisees, legatees and heirs of that person have, on his death, the same interest and rights in the proceeds of the sale, mortgage, exchange or disposition by the committee as they would have had in the property if it had not been sold, mortgaged, exchanged or disposed of and the proceeds, or any balance thereof, shall be deemed to be of the same nature and character as the property sold, mortgaged, exchanged or disposed of.

Replaces current subsection 24(1) and implements recommendation 27 (see p. 36).

Application to Public Trustee

23(2) Subsection (1) applies where the Public Trustee acts as committee for a person or as substitute decision maker for property for a person.

Mirrors current subsection 24(2).

Lapsed and void devises

24(1) Subject to sections 25 and 26, and except when a contrary intention appears by the will, real or personal property or an interest therein that is comprised, or intended to be comprised, in a devise or bequest that fails or becomes void by reason of the death of the devisee or donee in the lifetime of the testator, or by reason of the devise or bequest being contrary to law or otherwise incapable of taking effect, is included in the residuary devise or bequest, if any, contained in the will.

Mirrors current section 25. References to section numbers have been amended to accord with the draft Act.

Alternative beneficiary

24(2) For purposes of subsection (1), a contrary intention appears by the will when the testator has designated an alternative beneficiary and, in such a case, the devise or bequest shall be distributed to the named alternative beneficiary.

Implements recommendation 28 (see pp. 36-37). There is no comparable section in the current Act.

Exception

24(3) Subsection (1) does not apply to a residuary devise or bequest that fails or becomes void.

Implements recommendation 29 (see pp. 37-38). There is no comparable section in the current Act.

Devise of estate tail

25 Except when a contrary intention appears by the will, where a person to whom real property is devised for what would have been, under the law of England, an estate tail or in quasi entail,

(a) dies

  (i) in the lifetime of the testator, or

  (ii) at the same time as the testator, or

  (iii) in circumstances rendering it uncertain whether that person or the testator survived the other; and

(b) leaves issue who would inherit under the entail if that estate existed;

if any such issue are living at the time of the death of the testator, the devise does not lapse but creates an estate in fee simple in possession.

Mirrors current section 25.1.

When issue predecease testator

26 Except when a contrary intention appears by the will, where a person

(a) is a child or other issue or a brother or sister of a testator to whom, either as an individual or as a member of a class, is devised or bequeathed an estate or interest in real of personal property not determinable at or before the death of the child or other issue or the brother or sister, as the case may be; and

(b) has issue any of whom is living at the time of the death of the testator;

and that person dies in the lifetime of the testator after the testator makes the will, or the devise or bequest fails for any other reason, the devise or bequest does not lapse, but takes effect as if it had been made directly to the persons among whom, and in the shares in which, the estate of that person would have been divisible, as at the date of the testator's death, if that person had died intestate leaving a spouse *or common-law partner* and without debts immediately after the death of the testator.

Replaces current section 25.2, as am. S.M. 2001-2002, Royal Assent August 9, 2002 (yet to be proclaimed) and implements recommendation 31 (see p. 40).

Definition of issue

27 For the purpose of sections 25 and 26, issue conceived before the testator's death and born living thereafter shall be considered to be alive at the testator's death.

Mirrors current section 25.3. References to section numbers have been amended to accord with the current Act.

Survival of beneficiaries

28 Except when a contrary intention appears by the will, if a beneficiary fails to survive a testator by 30 days, any devises or bequests to that beneficiary shall be distributed as if the beneficiary had predeceased the testator.

Implements recommendation 33 (see pp. 41-42). There is no comparable section in the current Act.

Leaseholds in general devise

Mirrors current section 26.

29 Except when a contrary intention appears by the will, where a testator devises

(a) land of the testator; or

(b) land of the testator in a place mentioned in the will, or in the occupation of a person mentioned in the will; or

(c) land described in a general manner; or

(d) land described in a manner that would include a leasehold estate if the testator had no freehold estate which could be described in the manner used;

the devise includes the leasehold estates of the testator or any of them to which the description extends, as well as freehold estates.

Exercise of general power of appointment

Mirrors current subsection 27(1).

30(1) Except when a contrary intention appears by the will, a general devise of

(a) the real property of the testator; or

(b) the real property of the testator in a place mentioned in the will or in the occupation of a person mentioned in the will; or

(c) real property described in a general manner;

includes any real property or any real property to which the description extends, that the testator has power to appoint in any manner the testator thinks proper and operates as an execution of the power.

Bequest of personal property

Mirrors current subsection 27(2).

30(2) Except when a contrary intention appears by the will, a bequest of

(a) personal property of the testator; or

(b) personal property described in a general manner;

includes any personal property, or any personal property to which the description extends, that the testator has power to appoint in any manner the testator thinks proper and operates as an execution of the power.

Devise without words of limitation

31 Except when a contrary intention appears by the will, where real property is devised to a person without words of limitation, the devise passes the fee simple estate in the real property or the whole of any other estate in the real property that the testator had power to dispose of by will.

Mirrors current section 28.

Gifts to heirs

32 Except when a contrary intention appears by the will, where property is devised or bequeathed to the "heir" of the testator or of another person,

(a) the word "heir" means the person to whom the beneficial interest in the property would go under the law of the province if the testator or the other person died intestate; and

(b) where used in that law, the words "child", "issue" or "descendant" include, for the purposes of this section, a person related by or through adoption to the testator or other person.

Mirrors current section 29.

Meaning of "die without issue"

33(1) Subject to subsection (2), in a devise or bequest of real or personal property,

(a) the words,

(i) "dies without issue", or

(ii) "dies without leaving issue", or

(iii) "have no issue"; or

(b) other words importing either a want or failure of issue of a person in the person's lifetime or at the time of the death of the person or an indefinite failure of the person's issue;

shall, unless a contrary intention appears by the will, be construed to mean a want or failure of issue in the lifetime or at the time of death of that person, and not an indefinite failure of that person's issue.

Mirrors current subsection 30(1).

Exception

33(2) Subsection (1) does not extend to cases where the words defined therein import

(a) if no issue described in a preceding gift be born; or

(b) if there are no issue who live to attain the age or otherwise answer the description required for obtaining a vested estate by a preceding gift to that issue.

Mirrors current subsection 30(2).

Devise to trustees

34 Except when there is devised to a trustee or by implication an estate for a definite term of years absolute or determinable or an estate of freehold, a devise of real property to a trustee or executor passes the fee simple estate in the real property or the whole of any other estate or interest in the real property that the testator had power to dispose of by will.

Mirrors current section 31.

Unlimited devise to trustees

35 Where real property is devised to a trustee without express limitation of the estate to be taken by him and the beneficial interest in the real property or in the surplus rents and profits

(a) is not given to a person for life; or

(b) is given to a person for life but the purpose of the trust may continue beyond his life;

the devise vests in the trustee the fee simple estate in the real property or the whole of any other legal estate in the real property that the testator had power to dispose of by will and not an estate determinable when the purposes of the trust are satisfied.

Mirrors current section 32.

Advancement

36(1) Property which a testator gave to a beneficiary during the testator's lifetime shall be treated as an advancement against that beneficiary's share of the estate if the property was either

(a) declared by the testator orally or in writing at the time the gift was made; or

(b) acknowledged orally or in writing by the beneficiary

to be an advancement.

Implements recommendation 44 (see pp. 47-48). Subsections (1)-(5) are modelled on subsections 8(1)-8(5) of *The Instestate Succession Act*. There are no comparable subsections in the current Act.

Value of advancement

36(2) Property advanced shall be valued as declared by the testator, or acknowledged by the beneficiary, in writing, otherwise it shall be valued as of the time of the advancement.

Effect of advancement on beneficiary's issue

36(3) If the beneficiary fails to survive the testator, the property advanced shall not be treated as an advancement against the share of the estate of the beneficiary's issue unless the declaration or acknowledgement of the advancement so provides.

Determination of shares of successor

36(4) Under this section, the shares of the successors shall be determined as if the property advanced were part of the estate available for distribution, and if the value of the property advanced equals or exceeds the share of the estate of the successor who received the advancement, that successor shall be excluded from any share of the estate, but if the value of the property advanced is less than the share of the estate of the successor who received the advancement, that successor shall receive as much of the estate as is required, when added to the value of the property advanced, to give the successor his or her share of the estate.

Onus of proof

36(5) Unless the advancement has been declared by the testator, or acknowledged by the beneficiary, in writing, the onus of proving that an advancement was made is on the person so asserting.

All children legitimate

37(1) In the construction of testamentary dispositions, except when a contrary intention appears by the will, a child, whether born inside or outside marriage, shall be treated as the legitimate child of the child's natural parents unless, before the will takes effect, the relationship is severed by adoption.

Mirrors current subsection 35(1).

Relationship by adoption

37(2) In the construction of testamentary dispositions, except when a contrary intention appears in the will, the words "child", "issue" or "descendant" where used to refer to the child, issue or descendant of the testator or a specified person include a person related by or through adoption to the testator or the specified person and other words denoting other relationships to the testator or a specified person include persons standing in that relationship to the testator or that specified person by or through adoption by another person.

Mirrors current subsection 35(2).

Primary liability of mortgaged land

38(1) Where a person dies possessed of, or entitled to, or under a general power of appointment by will disposes of, an interest in real or personal property which, at the time of the death of the person, is subject to a mortgage that is related to the acquisition, use or improvement of the property, and the deceased has not, by will, deed, or other document, signified a contrary or other intention, the interest is, as between the different persons claiming through the deceased, primarily liable for the payment or satisfaction of the mortgage debt; and every part of the interest, according to its value, bears a proportionate part of the mortgage debt on the whole interest.

Replaces current subsection 36(1) and implements recommendation 34 (see pp. 42-43).

Signifying contrary intention

38(2) A testator does not signify a contrary or other intention within subsection (1) by

(a) a general direction for the payment of debts or of all debts of the testator out of his personal estate or his residuary real or personal estate; or

(b) a charge of debts upon that estate;

unless he further signifies that intention by words expressly or by necessary implication referring to all or some part of the mortgage debt.

Mirrors current subsection 36(2).

Saving

38(3) Nothing in this section affects a right of a person entitled to the mortgage debt to obtain payment or satisfaction either out of the other assets of the deceased or otherwise.

Mirrors current subsection 36(3).

"Mortgage" defined
38(4) In this section "mortgage" includes an equitable mortgage, and any charge whatsoever, whether legal, equitable, statutory or of other nature, including a lien or claim upon real or personal property for unpaid purchase money, and "mortgage debt" has a meaning similarly extended.

Mirrors current subsection 36(4).

Real and personal property liable rateably
39(1) Except when a contrary intention appears by the will, real and personal property included in the residue of the testator's estate is liable rateably, according to its respective values, for the payment of general bequests, including legacies and demonstrative legacies.

Implements recommendation 54 (see pp. 63-64). There is no comparable section in the current Act.

Personal property exempted
39(2) Notwithstanding that the will does not explicitly exonerate personal property in the estate from liability for payment of debts outstanding at the testator's death or pecuniary gifts, real property charged by the testator with the payment of such debts or gifts is primarily liable for that purpose.

Implements recommendation 55 (see p. 64). There is no comparable section in the current Act.

Executor as trustee of residue
40(1) Where a person dies after March 11, 1936, having by will appointed a person executor, the executor is a trustee of any residue not expressly disposed of, for the person or persons, if any, who would be entitled to that residue in the event of intestacy with respect thereto, unless the person so appointed executor was intended by the will to take the residue beneficially.

Mirrors current subsection 37(1).

Saving
40(2) Nothing in this section affects or prejudices a right to which the executor, if this Part had not been passed, would have been entitled, in cases where there is not a person who would be so entitled.

Mirrors current subsection 37(2).

Application of this Part
41(1) Subject to subsections (2), (3) and (4), this Part applies only to wills made after April 16, 1964; and for the purposes of this Part a will that is re-executed or is revived by a codicil shall be deemed to be made at the time it is so re-executed or revived.

Mirrors current subsection 38(1).

Application of anti-lapse provisions
41(2) Where a person dies on or after April 16, 1964 but before the coming into force of this subsection, section 34 of *The Wills Act*, R.S.M. 1988, c. W150, notwithstanding its repeal, applies to the will of the person whether it was made before or after April 16, 1964.

Mirrors current subsection 38(2).

Subsections 10(3) and 11(2) and section 21
41(3) Where a person dies on or after October 1, 1983, subsections 8(3) and 9(2) and section 21 apply to the will of the person whether it was made before or after that date but subsections 8(3) and 9(2) and section 21 do not apply to the will of a person who died before that date.

Mirrors current subsection 38(3). References to section numbers have been amended to accord with the draft Act.

Application of section 26
41(4) Where a person dies on or after the day this subsection comes into force, section 25 applies to the will of the person whether it was made or after that date.

Mirrors current subsection 38(4). References to section numbers have been amended to accord with the draft Act.

PART II - CONFLICT OF LAWS

All of Part II (with the exception of section 47 [now renumbered 50 to accord with the draft Act]) have been replaced with the following) and implement recommendations 36-44 (see pp. 43-47).

Definitions

42 In this Part,

"domiciled" and "habitually resident" are defined by *The Domicile and Habitual Residence Act*;

and

"law" in relation to any place excludes the choice of law rules of that place.

Application of Part

43 This Part applies to a will made either in or out of this province.

Governing law

44(1) Succession is governed by the law of the place in which the testator at the time of his death was domiciled and habitually resident, if he was then a national of that place.

Exceptional circumstances

44(2) Notwithstanding subsection (1), if the testator was at the time of his death manifestly more closely connected with the place of which he was then a national, the law of that place applies.

Other cases

44(3) In other cases, succession is governed by the law of the place of which at the time of his death the testator was a national, unless at that time the deceased was more closely connected with another place, in which case the law of the latter place applies.

Validity

45(1) Notwithstanding section 44, as regards the formal and intrinsic validity of a will, a will is valid and admissible to probate if, at the time of its making, it complied with the law of the place

(a) where the will was made; or

(b) where the testator was domiciled at that time; or

(c) of the testator's habitual residence at that time; or

(d) where the testator was a national at that time if there was in that place one body of law governing the wills of nationals.

Properly made wills

45(2) Notwithstanding subsection (1), the following are properly made as regards their formal and intrinsic validity:

(a) a will made on board a vessel or aircraft of any description, if the making of the will conformed to the law in force in the place with which, having regard to its registration, if any, and other relevant circumstances, the vessel or aircraft may be taken to have been most closely connected;

(b) a writing so far as it evokes a will which under this Part would be treated as properly made or revokes a provision which under this Part would be treated as comprised in a properly made will, if the making of the later writing, including the capacity of the testator, conformed to any law by reference to which the revoked will or provision would be treated as properly made;

(c) a will so far as it exercises a power of appointment, if the making of the will conforms to the law governing the essential validity of the power.

Designation of applicable law

46(1) A testator may designate the law of a particular place to govern the succession to the whole of his estate. The designation will be effective only if at the time of the designation or of his death the testator was a national of that place or had his habitual residence there.

Formal requirements

46(2) A designation under subsection (1) shall be expressed in a statement made in accordance with the formal requirements for dispositions of property upon death. The existence and material validity of the act of designation are governed by the law designated. If, under that law the designation is invalid, the law governing the succession is determined under sections 43 and 44.

Revocation of designation

46(3) The revocation of a designation made under subsection (1) shall comply with the rules as to form applicable to the revocation of dispositions of property upon death.

Designation applies whether or not testate

46(4) For the purposes of this section, a designation of the applicable law, in the absence of an express contrary provision by the deceased, is to be construed as governing succession to the whole of the estate of the testator whether he died wholly or partially intestate.

Designation of applicable law for individual assets

47 A testator may designate the law of one or more places to govern the succession to particular assets in his estate. However, any such designation is without prejudice to the application of the mandatory rules of the law applicable according to sections 44 through 46.

Application of rules

48(1) Subject to section 47, the applicable law under sections 44 through 46 governs the whole of the estate of the testator wherever the assets are located.

Matters governed

48(2) The applicable law under sections 44 through 46 governs

(a) the testamentary capacity of the testator;

(b) the determination of the heirs, devisees and legatees, the respective shares of those persons and the obligations imposed upon them by the deceased, as well as other succession rights arising by reason of death including provision by a court or other authority out of the estate of the deceased in favour of persons close to the deceased;

(c) disinheritance and disqualification by conduct;

(d) any obligation to restore or account for gifts, advancements or legacies when determining the shares of heirs, devisees or legatees;

(e) the disposable part of the estate, indefeasible interests and other restrictions on dispositions of property upon death;

(f) the material validity of testamentary dispositions; and

(g) the revocatory effect of the destruction of a will.

Law governing effect of marriage, divorce, or annulment

49 Notwithstanding sections 44 through 48, the law governing the effect of a marriage, divorce or annulment of a marriage on a will or a testamentary disposition is the law of the place in which the testator is domiciled and habitually resident at the time of the marriage, divorce or annulment, as the case may be.

Construction of will

50(1) In construing a will, the court shall, to the extent possible, give effect to the testator's intention without reference to rules or presumptions of law.

The Commission is concerned that confusion may arise as to the application of this section. Legislative Counsel may want to amend the provision to clarify that it only applies to private international law matters.

Law governing construction
50(2) Where it is necessary in order to determine the testator's intention, the court shall apply the law of the place intended by the testator to govern construction of the will.

Determination of applicable law
50(3) Subject to subsection (4), if the court is unable to determine which law the testator intended to govern the construction of the will under subsection (2), it shall apply the law of the place in which the testator was domiciled and habitually resident at the time of death.

Law governing immovables
50(4) Where the will purports to create an interest in an immovable that is not permitted by the law of the place where the immovable is situate, the court shall apply the law of that place.

Application of Part
51(1) This part applies to the will of a testator who dies after June 30, 1975, whether the will was made before, on, or after June 30, 1975.

Mirrors current subsection 47(1).

Saving clause for old wills
51(2) Where a will of a testator who dies after June 30, 1975, was made before July 1, 1975, if the will would have been valid in whole or in part under the law of Manitoba it was on the date that the will was made had the testator died before that law was changed, nothing in this Part diminishes or detracts from that validity.

Mirrors current subsection 47(2).

Effect of former Part II
51(3) Subject to subsection (1), notwithstanding the repeal of Part II of *The Wills Act*, as it was set out in chapter W150 of the Revised Statutes of Manitoba 1970, that Part II, so repealed, continues to apply to wills made on or after July 1, 1955 and before July 1, 1975, and to that extent, and for that purpose, shall be deemed to remain in full force and effect.

Mirrors current subsection 47(3).

Effect of part II of R.S.M. 1954

51(4) Subject to subsection (1) and subsection 59(1), notwithstanding the repeal of Part II of *The Wills Act*, as it was set out in chapter 293 of the Revised Statutes of Manitoba 1954, that Part II, so repealed, continues to apply to wills made before July 1, 1955, and to that extent, and for that purpose, shall be deemed to be in full force and effect.

Mirrors current subsection 47(4).

PART III - INTERNATIONAL WILLS

This Part mirrors Part III of the current Act. References to section numbers have been amended to accord with the draft Act.

Definitions

52 In this Part,

"convention" means the convention providing a uniform law on the form of international will, a copy of which is set out in the schedule to this Act;

"international will" means a will that has been made in accordance with the rules regarding an international will set out in the Annex to the convention.

"registrar" means the person responsible for the operation and management of the registration system;

"registration system" means a system of the registration, or the registration and safekeeping, of international wills established under section 54 or pursuant to an agreement entered into under section 55.

Application of convention

53 On, from and after February 9, 1978, the convention is in force in the province and applies to wills as law of the province.

Rules re international will

54 On, from and after February 9, 1978, the rules regarding an international will set out in the Annex to the convention are law in the province.

Validity under other laws

55 Nothing in this Part detracts from or affects the validity of a will that is valid under the laws in force within the province other than this Part.

Authorized persons

56 All members of The Law Society of Manitoba are designated as persons authorized to act in connection with international wills.

Regulations

57 The Lieutenant Governor in Council may make regulations respecting the operation, maintenance and use of the registration system, and without limiting the generality of the foregoing, may make regulations

(a) prescribing forms for use in the system; and

(b) prescribing fees for searches of the registration system.

PART IV - MISCELLANEOUS

Parts I and IV of the current Act are both headed "General"; perhaps this Part should be renamed "Miscellaneous". References to section numbers have been amended to accord with the draft Act.

Act subject to Homesteads and *Family* Property Acts

58 This Act is subject to *The Homesteads Act* and Part IV of *The Family Property Act* respecting the equalization of assets after the death of a spouse *or common-law partner*.

As am. S.M. 2001-2002, Royal Assent August 9, 2002 (yet to be proclaimed).

Application of 1913 Act

59(1) Subject to subsections 41(2), (3) and (4) and subsection 51(1), *The Manitoba Wills Act*, being chapter 204 of the Revised Statutes of Manitoba, 1913, continues in force in respect of wills made before March 12, 1936.

Application of 1954 Act

59(2) Subject to subsections 41(2), (3) and (4), Part I of *The Wills Act*, as it was set forth in chapter 293 of the Revised Statutes of Manitoba 1954, continues in force in respect of wills made on or after March 12, 1936 and before April 16, 1964.

Application of 1988 Act

59(3) Subject to subsections 41(2), (3) and (4), Part I of *The Wills Act*, as it was set forth in chapter W150 of the Revised Statutes of Manitoba 1988, continues in force in respect of wills made on or after April 16, 1964 and before [the date of this Act].

Repeal

60 *The Wills Act*, R.S.M. 1988, c. W150, is repealed.

C.C.S.M. reference

61 This Act may be referred to as chapter !150 of the Continuing Consolidation of the Statutes of Manitoba.

Coming into force

62 This Act comes into force on a day fixed by proclamation.

DRAFT AMENDING ACT

HER MAJESTY, by and with the advice and consent of the Legislative Assembly of Manitoba, enacts as follows:

PART I

THE LAW OF PROPERTY ACT

C.C.S.M. c. L90 amended

1. *The Law of Property Act* is amended by this Part.

2. Subsections 17.3(4) and 17.3(5) are replaced with the following:

As am. S.M. 2001-2002, c. 48 (yet to be proclaimed). Implements recommendation 49-56 (see pp. 61-65).

17.3(4)(a) Subject to section 37 of *The Wills Act*, and subject to a contrary intention appearing by the will, the order in which assets are used for the payment of unsecured debts, funeral expenses, and the costs of administering a deceased person's estate [and for purposes of section 41 of *The Family Property Act* and section 12 of *The Dependants Relief Act*] shall be:

(i) assets specifically charged with the payment of debts or left in trust for the payment of debts;

(ii) assets passing by way of intestacy and residue;

(iii) assets comprising general gifts;

(iv) assets comprising specific and demonstrative gifts; and

(v) assets over which the deceased had a general power of appointment that has been expressly exercised by will.

(b) Each of the classes of assets described in subclauses (a)(i) through (v) includes both real and personal property, and no distinction shall be made between the two types of property within a given class.

(c) Within each class of asset described in subclauses (a)(i) through (v), each asset shall contribute rateably.

(d) For the purposes of subclause (a)(i), no assets are specifically charged with nor left in trust for the payment of debts where the testator merely

(i) gives a general

direction that debts be paid;

(ii) gives a general direction that the executor pay the testator's debts; or

(iii) imposes a trust that the testator's debts be paid.

PART 2

THE INTESTATE SUCCESSION ACT

C.C.S.M. c. I85 amended

3. The Intestate Succession Act is amended by this Part.

4. Section 6 is amended by replacing "15" and "30".

Implements recommendation 61 (see pp. 70-71).

5. Section 7 is renumbered as subsection 7(1), and the following is added as subsection 7(2):

7(2) For greater certainty, the only ascendant and collateral blood relatives entitled to succeed under this Act are those up to and including great grandparents of the intestate and their issue.

Implements recommendation 57 (see p. 66).

6. Section 8(1) is amended by

(a) inserting "or part" between "all" and "of"; and

(b) in clause (a), inserting "before, after, or" between "writing" and "at".

Implements recommendation 58 (see pp. 66-67).

7. The following is added as Section 11.1:

Implements recommendation 60 (see pp. 67-70).

Conflict of laws

11.1(1) Succession is governed by the law of the state and subdivision thereof in which the intestate at the time of his death was habitually resident, as defined in *The Domicile and Habitual Residence Act*, if he was then a national of that state.

11.1(2) Succession is also governed by the law of the state and subdivision thereof in which the intestate at the time of his death as habitually resident if he had been resident there for a period of no less than five years immediately preceding his death. However, in exceptional circumstances, if at the time of his death he was manifestly more closely connected with the state of which he was a national, the law of that state applies.

11.1(3) In other cases succession is governed by the law of the state of which at the time of his death the intestate was a national, unless at that time the intestate was more closely connected with another state, in which case the law of the latter state applies.

PART 3

THE FAMILY PROPERTY ACT

C.C.S.M. c. F25 amended

8. *The Family Property Act* is amended by this Part.

As am. S.M. 2001-2002, c. 48 (yet to be enacted)

9. Subsection 27(3) is amended by removing the word "specifically".

Implements recommendation 62 (see pp. 72-73).

10. Subsection 38 is amended by replacing "," with "by" and adding the following:

Implements recommendation 63 (see p. 73).

(a) calculating the surviving spouse's *or common law partner's* entitlement under this Part without reference to this section;

(b) subtracting the entitlement calculated under clause (a) from the value of the deceased spouse's *or common law partner's* estate for purposes of calculating the surviving spouse's *or common law partner's* entitlement under *The Intestate Succession Act*;

(c) calculating the surviving spouse's *or common law partner's* entitlement under *The Intestate Succession Act*; and

(d) calculating the surviving spouse's *or common law partner's* entitlement under this Part, taking into account the calculation in clause (c).

11. Subsection 41(2) is repealed and replaced with the following:

Implements recommendation 56 (see pp. 64-65).

Priority of equalization payment

41(2) (a) Subject to a contrary intention appearing in the will, the order in which assets are used for the satisfaction of an equalization payment shall be:

(i) assets specifically charged with or left in trust for the payment of debts.

(ii) assets passing by way of intestacy and residue;

(iii) assets comprising general gifts;

(iv) assets comprising specific and demonstrative gifts; and

(v) assets over which the deceased had a general power of appointment that has been expressly exercised by will.

(b) Each of the classes of assets described in subclauses (a)(i) through (v) includes both real and personal property, and no distinction shall be made between the two types of property within a given class.

(c) Within each class of asset described in subclauses (a)(i) through (v), each asset shall contributed rateably.

(d) For the purposes of subclause (a)(i), no assets are specifically charged with nor left in trust for the payment of debts where the testator merely

(i) gives a general direction that debts be paid;

(ii) gives a general direction that the executor pay the debts; or

(iii) imposes a trust that the debts be paid.

PART 4

THE DEPENDANTS RELIEF ACT

C.C.S.M. c. M45 amended

12. The Dependants Relief Act is amended by this Part.

13. The following is added as subsections 2(4) through 2(6):

Implements recommendations 64, 70 and 71 (see pp. 74-75 and 78-81).

2(4) An application may be made or continued under this Act by the personal representative of a deceased dependant.

2(5) The court may make an order under subsection (1) notwithstanding that the dependant is neither resident nor domiciled in Manitoba.

2(6) An order may be made under subsection (1) despite any agreement under which the dependant waived or released his or her rights under this Act, but such an agreement is a factor to be considered by the court.

14. Section 3 is renumbered as subsection 3(1), and the following is added as subsection 3(2):

Implements recommendation 65 (see pp. 75-76).

3(2) For the purposes of subsection (1), "dependant" includes a person who is not otherwise a dependant only because he or she was not substantially dependent on the deceased at the time of the deceased's death.

15. Clauses 6(3)(a), (b) and (c) are replaced by "it is just to do so."

Implements recommendation 66 (see pp. 76-77).

16. Subsections 7(2) and (3) are renumbered 7(3) and (4), respectively, and the following is added as subsection 7(2):

7(2) Whether or not an application has been made and notice served, the personal representative of the deceased shall not, unless all persons entitled to apply under this Act consent or the court otherwise orders, proceed with the distribution of the estate until after the expiry of the limitation period defined in subsection 6(1).

Implements recommendation 67 (see p. 77).

17. The following is added as clause 8(1)(l):

8(1)(l) the existence of persons who are substantially financially dependent on the dependant.

Implements recommendation 68 (see p. 78).

18. Sections 12(1) and 12(2) are repealed and replaced with the following:

Implements recommendation 56 (see pp. 64-65).

Incidence of provision ordered

12 (a) Where an order for maintenance and support is made under this Act, the amount ordered is deemed to be a debt of the deceased, is payable after the other liabilities of the estate and has priority over a bequest or devise contained in the will of the deceased;

(b) Subject to a contrary intention appearing in the will, the order in which assets are used for the payment of an order for maintenance and support, shall be:

(i) assets specifically charged with or left in trust for the payment of debts;

(ii) assets passing by way of intestacy and residue;

(iii) assets comprising general gifts;

(iv) assets comprising specific and demonstrative gifts; and

(v) assets over which the deceased had a general power of appointment that has been expressly exercised by will.

(c) Each of the classes of assets described in subclauses (b)(i) through (v) includes both real and personal property, and no distinction shall be made between the two types of property within a given class.

(d) Within each class of asset described in subclauses (b)(i) through (v), each asset shall contribute rateably.

(e) For the purposes of subclauses (b)(i), no assets are specifically charged with nor left in trust for the payment of

debts where the deceased merely

(i) gives a general direction that debts be paid.

(ii) gives a general direction that the executor pay the debts; or

(iii) imposes a trust that debts be paid.

19. Subsection 13 is replaced with the following:

13(1) The court's jurisdiction to grant an order making provision for a dependant is governed by the law of the place in which the deceased at the time of his death was habitually resident, as defined in *The Domicile and Habitual Residence Act*, if he was then a national of that state.

13(2) Notwithstanding subsection (1), if the deceased was, at the time of his death, manifestly more closely connected with the place of which he was a national, the law of that place applies.

13(3) In other cases, the court's jurisdiction is governed by the law of the place of which at the time of his death the deceased was a national, unless at that time the intestate was more closely connected with another place, in which case the law of the latter place applies.

Implements recommendations 37 and 69 (see pp. 43-44 and 78-79).

20. Section 10 is renumbered as subsection 10(1), and the following are added as subsections 10(2) through 10(4):

Implements recommendation 72 (see pp. 81-82).

10(2) Subject to subsections (3) and (4), where the deceased has entered into an enforceable contract during his lifetime to devise property by will, the court may order that the interest of the promisee under such contract is subject to an order making provision for maintenance and support under this Act, whether or not the promisee complied with the terms of the contract, if the court is satisfied that

(a) the value of the property exceed the value of the consideration received by the deceased in money or money's worth;

(b) the deceased entered into the contract with the intention of removing property from his estate in order to reduce or defeat a claim under this Act;

(c) the promisee had actual or constructive notice of this intent; and

(d) there would be insufficient assets in the estate to make reasonable provision for the maintenance and support of a dependant after the transfer of the property.

Implements recommendation 73 (see pp. 81-82).

10(3) In making an order under subsection (2), the court shall ensure that its order will not deprive the promisee of the right to receive property, or to recover damages for the breach of the contract, in an amount which is at least equal to the value of the consideration received by the deceased in money or money's worth.

10(4) In making a determination under clause (2)(a), and in determining in what manner to exercise its jurisdiction under subsection (2), the court shall have regard to:

(a) the value of the property that is the subject of the contract, and the value of the consideration, at the date of the contract;

(b) the reasonable expectation of the parties as to the life expectancy of the deceased at the date of the contract;

(c) if the property was not ascertained at the date of the contract, the reasonable expectations of the parties as to its likely nature and extent; and

(d) if the consideration was a promise, the reasonable expectations of the parties as to that which would be delivered under the promise.

Implements recommendation 74 (see pp. 81-83).

21. The following is added as section 10.1:

10.1(1) The capital value of the following transactions effected by a deceased before his death, whether benefitting a dependant or any other person, shall be included as testamentary dispositions as of the date of the death of the deceased and shall be deemed to be part of his estate for purposes of ascertaining the value of his estate, and being available to be charged for payment by an order under subsection 2(1):

(a) gifts mortis causa;

(b) money deposited, together with interest thereon, in an account in the name of the deceased in trust for another or others with any bank, savings office, credit union or trust corporation, and remaining on deposit at the date of the death of the deceased;

(c) money deposited, together with interest thereon, in an account in the name of the deceased and another person or persons and payable on death under the terms of the deposit or by operation of law to the survivor or survivors of those persons with any bank, savings office, credit union or trust corporation, and remaining on deposit at the date of the death of the deceased;

(d) any disposition of property made by a deceased whereby property is held at the date of his or her death by the deceased and another as joint tenants;

(e) any disposition of property made by the deceased in trust or otherwise, to the extent that the deceased at the date of his or her death retained, either alone or in conjunction with another person or persons by the express provisions of the disposing instrument, a power to revoke such disposition, or

Implements recommendation 75 (see pp. 83-84).

a power to consume, invoke or dispose of the principal thereof, but the provisions of this clause do not affect the right of any income beneficiary to the income accrued and undistributed at the date of the death of the deceased;

(f) any amount payable under a policy of insurance effected on the life of the deceased and owned by him or her;

(g) any amount payable on the death of the deceased under a policy of group insurance; and

(h) any amount payable under a designation of beneficiary under Part III.

10.1(2) The capital value of the transactions referred to in clauses (1)(b), (c) and (d) shall be deemed to be included in the net estate of the deceased to the extent that the funds on deposit were the property of the deceased immediately before the deposit or the consideration for the property held as joint tenants was furnished by the deceased.

10.1(3) Dependants shall have the burden of establishing that the funds or property, or any portion thereof, belonged to the deceased.

10.1(4) Where the other party to a transaction described in clause (1)(c) or (d) is a dependant, he or she shall have the burden of establishing the amount of his or her contribution, if any.

10.1(5) This section does not prohibit any corporation or person from paying or transferring any funds or property, or any portion thereof, to any person otherwise entitled thereto unless there has been personally served on the corporation or person a certified copy of the suspensory order made

under section 3 enjoining such payment or transfer.

10.1(6) Personal service upon the corporation or person holding any such fund or property of a certified copy of a suspensory order shall be a defence to any action or proceeding brought against the corporation or person with respect to the fund or property during the period the order is in force.

10.1(7) This section does not affect the rights of creditors of the deceased in any transaction with respect to which a creditor has rights.

PART 5

THE TRUSTEE ACT

C.C.S.M. c. M45 amended

22. The Trustee Act is amended by this Part.

23. Subsection 6(4) is replaced by the following:

6(4) The executor of the last surviving named or appointed executor of an estate is by virtue of such executorship the executor of the estate of which his testator was named or appointed executor, until

(a) an administrator with will annexed is appointed to administer the estate; or

(b) six months have elapsed from the date on which the executor was appointed,

whichever occurs first.

Implements recommendation 76 (see pp. 85-86).

PART 6

COMING INTO FORCE

24. This Act comes into force on the day it receives Royal Assent.

APPENDIX B

HAGUE CONFERENCE ON PRIVATE INTERNATIONAL LAW

Convention on the Law Applicable to Succession to the Estates of Deceased Persons signed on the 20th of October 1988

CONVENTION #32

CHAPTER I – SCOPE OF THE CONVENTION

Article 1

(1) This Convention determines the law applicable to succession to the estates of deceased persons.

(2) The Convention does not apply to –

a) the form of dispositions of property upon death;

b) capacity to dispose of property upon death;

c) issues pertaining to matrimonial property;

d) property rights, interests or assets created or transferred otherwise than by succession, such as in joint ownership with right of survival, pension plans, insurance contracts, or arrangements of a similar nature.

Article 2

The Convention applies even if the applicable law is that of a non-Contracting State.

CHAPTER II – APPLICABLE LAW

Article 3

(1) Succession is governed by the law of the State in which the deceased at the time of his death was habitually resident, if he was then a national of that State.

(2) Succession is also governed by the law of the State in which the deceased at the time of his death was habitually resident if he had been resident there for a period of no less than five years immediately preceding his death. However, in exceptional circumstances, if at the time of his death he was manifestly more closely connected with the State of which he was then a national, the law of that State applies.

(3) In other cases succession is governed by the law of the State of which at the time of his death the deceased was a national, unless at that time the deceased was more closely connected with another State, in which case the law of the latter State applies.

Article 4

If the law applicable according to Article 3 is that of a non-Contracting State, and if the choice of law rules of that State designate, with respect to the whole or part of the succession, the law of another non-Contracting State which would apply its own law, the law of the latter State

applies.

Article 5

(1) A person may designate the law of a particular State to govern the succession to the whole of his estate. The designation will be effective only if at the time of the designation or of his death such person was a national of that State or had his habitual residence there.

(2) This designation shall be expressed in a statement made in accordance with the formal requirements for dispositions of property upon death. The existence and material validity of the act of designation are governed by the law designated. If under that law the designation is invalid, the law governing the succession is determined under Article 3.

(3) The revocation of such a designation by its maker shall comply with the rules as to form applicable to the revocation of dispositions of property upon death.

(4) For the purposes of this Article, a designation of the applicable law, in the absence of an express contrary provision by the deceased, is to be construed as governing succession to the whole of the estate of the deceased whether he died intestate or wholly or partially testate.

Article 6

A person may designate the law of one or more States to govern the succession to particular assets in his estate. However, any such designation is without prejudice to the application of the mandatory rules of the law applicable according to Article 3 or Article 5, paragraph 1.

Article 7

(1) Subject to Article 6, the applicable law under Articles 3 and 5, paragraph 1, governs the whole of the estate of the deceased wherever the assets are located.

(2) This law governs –

a) the determination of the heirs, devisees and legatees, the respective shares of those persons and the obligations imposed upon them by the deceased, as well as other succession rights arising by reason of death including provision by a court or other authority out of the estate of the deceased in favour of persons close to the deceased;

b) disinheritance and disqualification by conduct;

c) any obligation to restore or account for gifts, advancements or legacies when determining the shares of heirs, devisees or legatees;

d) the disposable part of the estate, indefeasible interests and other restrictions on dispositions of property upon death;

e) the material validity of testamentary dispositions.

(3) Paragraph 2 does not preclude the application in a Contracting State of the law applicable under this Convention to other matters which are considered by that State to be governed by the law of succession.

CHAPTER III – AGREEMENTS AS TO SUCCESSION

Article 8

For the purposes of this Chapter an agreement as to succession is an agreement created in writing or resulting from mutual wills which, with or without consideration, creates, varies or

terminates rights in the future estate or estates of one or more persons parties to such agreement.

Article 9

(1) Where the agreement involves the estate of one person only, its material validity, the effects of the agreement, and the circumstances resulting in the extinction of the effects, are determined by the law which under Article 3 or 5, paragraph 1, would have been applicable to the succession to the estate of that person if that person had died on the date of the agreement.
(2) If under that law the agreement is invalid, it is nevertheless valid if it is valid under the law which at the time of death is the law applicable to the succession to the estate of that person according to Article 3 or 5, paragraph 1. The same law then governs the effects of the agreement and the circumstances resulting in the extinction of the effects.

Article 10

(1) Where the agreement involves the estates of more than one person, the agreement is materially valid only if it is so valid under all the laws which, according to Article 3 or 5, paragraph 1, would have governed the succession to the estates of all those persons if each such person had died on the date of the agreement.
(2) The effects of the agreement and the circumstances resulting in the extinction of the effects are those recognized by all of those laws.

Article 11

The parties may agree by express designation to subject the agreement, so far as its material validity, the effects of the agreement, and the circumstances resulting in the extinction of the effects are concerned, to the law of a State in which the person or any one of the persons whose future estate is involved has his habitual residence or of which he is a national at the time of the conclusion of the agreement.

Article 12

(1) The material validity of an agreement valid under the law applicable according to Article 9, 10 or 11 may not be contested on the ground that the agreement would be invalid under the law applicable according to Article 3 or 5, paragraph 1.
(2) However, the application of the law applicable according to Article 9, 10 or 11 shall not affect the rights of anyone not party to the agreement who under the law applicable to the succession by virtue of Article 3 or 5, paragraph 1, has an indefeasible interest in the estate or another right of which he cannot be deprived by the person whose estate is in question.

CHAPTER IV – GENERAL PROVISIONS

Article 13

Where two or more persons whose successions are governed by different laws die in circumstances in which it is uncertain in what order their deaths occurred, and where those laws provide differently for this situation or make no provision at all, none of the deceased persons shall have any succession rights to the other or others.

Article 14

(1) Where a trust is created in a disposition of property upon death, the application to the succession of the law determined by the Convention does not preclude the application of another law to the trust.

Conversely, the application to a trust of its governing law does not preclude the application to the succession of the law governing succession by virtue of the Convention.

(2) The same rules apply by analogy to foundations and corresponding institutions created by dispositions of property upon death.

Article 15

The law applicable under the Convention does not affect the application of any rules of the law of the State where certain immovables, enterprises or other special categories of assets are situated, which rules institute a particular inheritance regime in respect of such assets because of economic, family or social considerations.

Article 16

Where under the law applicable by virtue of the Convention there is no heir, devisee or legatee under a disposition of property upon death, and no physical person is an heir by operation of law, the application of the law so determined does not preclude a State or an entity appointed thereto by that State from appropriating the assets of the estate that are situated in its territory.

Article 17

In this Convention, and subject to Article 4, law means the law in force in a State other than its choice of law rules.

Article 18

The application of any of the laws determined by the Convention may be refused only where such application would be manifestly incompatible with public policy (*ordre public*).

Article 19

(1) For the purposes of identifying the law applicable under this Convention, where a State comprises two or more territorial units, each of which has its own system of law or its own rules of law in respect of succession, the provisions of this Article apply.

(2) If there are rules in force in such a State identifying which law among the laws of the two or more units is to apply in any circumstance for which this Article provides, the law of that unit applies. In the absence of such rules the following paragraphs of this Article apply.

(3) For the purposes of any reference in this Convention, or any designation by the deceased pursuant to this Convention,

a) the law of the State of the habitual residence of the deceased at the time of designation or of his death means the law of that unit of the State in which at the relevant time the deceased had his habitual residence;

b) the law of the State of the nationality of the deceased at the time of designation or of his

death means the law of that unit of the State in which at the relevant time the deceased had his habitual residence, and in the absence of such an habitual residence, the law of the unit with which he had his closest connection.
(4) For the purposes of any reference in this Convention, the law of the State of closest connection means the law of that unit of the State with which the deceased was most closely connected.
(5) Subject to Article 6, for the purposes of any designation pursuant to this Convention whereby the deceased designates the law of a unit of the State of which at the time of designation or of his death
a) he was a national, that designation is valid only if at some time he had had an habitual residence in, or in the absence of such an habitual residence, a close connection with, that unit;
b) he was not a national, the designation is valid only if he then had his habitual residence in that unit, or, if he was not then habitually resident in that unit but was so resident in that State, he had had an habitual residence in that unit at some time.
(6) For the purposes of any designation under Article 6 with regard to particular assets whereby the deceased designates the law of a State, it is presumed that, subject to evidence of contrary intent, the designation means the law of each unit in which the assets are situated.
(7) For the purposes of Article 3, paragraph 2, the required period of residence is attained when the deceased for the five years immediately preceding his death had his residence in that State, notwithstanding that during that period he resided in more than one of the units of that State. When the period has been attained, and the deceased had an habitual residence in that State at that time, but no habitual residence in any particular unit of that State, the applicable law is the law of that unit in which the deceased last resided, unless at that time he had a closer connection with another unit of the State, in which case the law of the latter unit applies.

Article 20
For purposes of identifying the law applicable under this Convention, where a State has two or more legal systems applicable to the succession of deceased persons for different categories of persons, any reference to the law of such State shall be construed as referring to the legal system determined by the rules in force in that State. In the absence of such rules, the reference shall be construed as referring to the legal system with which the deceased had the closest connection.

Article 21
A Contracting State in which different systems of law or sets of rules of law apply to succession shall not be bound to apply the rules of the Convention to conflicts solely between the laws of such different systems or sets of rules of law.

Article 22
(1) The Convention applies in a Contracting State to the succession of any person whose death occurs after the Convention has entered into force for that State.
(2) Where at a time prior to the entry into force of the Convention in that State the deceased has designated the law applicable to his succession, that designation is to be considered valid there

if it complies with Article 5.
(3) Where at a time prior to the entry into force of the Convention in that State the parties to an agreement as to succession have designated the law applicable to that agreement, that designation is to be considered valid there if it complies with Article 11.

Article 23
(1) The Convention does not affect any other international instrument to which Contracting States are or become Parties and which contains provisions on matters governed by this Convention, unless a contrary declaration is made by the States Parties to such instrument.
(2) Paragraph 1 of this Article also applies to uniform laws based on special ties of a regional or other nature between the States concerned.

Article 24
(1) Any State may, at the time of signature, ratification, acceptance, approval or accession, make any of the following reservations –
a) that it will not apply the Convention to agreements as to succession as defined in Article 8, and therefore that it will not recognize a designation made under Article 5 if the designation is not expressed in a statement made in accordance with the requirements for a testamentary disposition;
b) that it will not apply Article 4;
c) that it will not recognize a designation made under Article 5 by a person who, at the time of his death, was not or was no longer either a national of, or habitually resident in, the State whose law he had designated, but at that time was a national of and habitually resident in the reserving State;
d) that it will not recognize a designation made under Article 5, if all of the following conditions are met –
– the law of the State making the reservation would have been the applicable law under Article 3 if there had been no valid designation made under Article 5,
– the application of the law designated under Article 5 would totally or very substantially deprive the spouse or a child of the deceased of an inheritance or family provision to which the spouse or child would have been entitled under the mandatory rules of the law of the State making this reservation,
– that spouse or child is habitually resident in or a national of that State.
(2) No other reservation shall be permitted.
(3) Any Contracting State may at any time withdraw a reservation which it has made; the reservation shall cease to have effect on the first day of the month following the expiration of three months after notification of the withdrawal.

CHAPTER V – FINAL CLAUSES

Article 25
(1) The Convention shall be open for signature by the States which were Members of the Hague Conference on Private International Law at the time of its Sixteenth Session.
(2) It shall be ratified, accepted or approved and the instruments of ratification, acceptance or

approval shall be deposited with the Ministry of Foreign Affairs of the Kingdom of the Netherlands, depositary of the Convention.

Article 26
(1) Any other State may accede to the Convention after it has entered into force in accordance with Article 28, paragraph 1.
(2) The instrument of accession shall be deposited with the depositary.

Article 27
(1) If a State has two or more territorial units in which different systems of law are applicable in relation to matters dealt with in this Convention, it may at the time of signature, ratification, acceptance, approval or accession declare that this Convention shall extend to all of its territorial units or only to one or more of them and may alter this declaration by submitting another declaration at any time.
(2) Any such declaration shall be notified to the depositary and shall state expressly the territorial units to which the Convention applies.
(3) If a State makes no declaration under this Article, the Convention is to extend to all territorial units of that State.

Article 28
(1) The Convention shall enter into force on the first day of the month following the expiration of three months after the deposit of the third instrument of ratification, acceptance or approval referred to in Article 25.
(2) Thereafter the Convention shall enter into force –
a) for each State ratifying, accepting or approving it subsequently, or acceding to it, on the first day of the month following the expiration of three months after the deposit of its instrument of ratification, acceptance, approval or accession;
b) for a territorial unit to which the Convention has been extended in conformity with Article 27, on the first day of the month following the expiration of three months after the notification referred to in that Article.

Article 29
After the entry into force of an instrument revising this Convention a State may only become Party to the Convention as revised.

Article 30
(1) A State Party to this Convention may denounce it, or only Chapter III of the Convention, by a notification in writing addressed to the depositary.
(2) The denunciation takes effect on the first day of the month following the expiration of three months after the notification is received by the depositary. Where a longer period for the denunciation to take effect is specified in the notification, the denunciation takes effect upon the expiration of such longer period after the notification is received by the depositary.

Article 31

The depositary shall notify the States Members of the Hague Conference on Private International Law and the States which have acceded in accordance with Article 26 of the following –

a) the signatures and ratifications, acceptances, approvals and accessions referred to in Articles 25 and 26;

b) the date on which the Convention enters into force in accordance with Article 28;

c) the declarations referred to in Article 27;

d) the reservations and withdrawals of reservations referred to in Article 24;

e) the denunciations referred to in Article 30.

In witness whereof the undersigned, being duly authorized thereto, have signed this Convention.

Done at The Hague, on the 1st day of August 1989, in the English and French languages, both texts being equally authentic, in a single copy which shall be deposited in the archives of the Government of the Kingdom of the Netherlands, and of which a certified copy shall be sent, through diplomatic channels, to each of the States Members of the Hague Conference on Private International Law at the date of its Sixteenth Session.

REPORT ON
WILLS AND SUCCESSION LEGISLATION

EXECUTIVE SUMMARY

A. INTRODUCTION

This Report attempts to review all of Manitoba's succession legislation, with the intention of ensuring its integrity and relevance and that, as a whole, the legislation operates as effectively and harmoniously as possible. The Report focuses primarily on *The Wills Act* but also includes an examination of relevant provisions of *The Law of Property Act, The Intestate Succession Act, The Marital Property Act, The Dependants Relief Act, The Trustee Act*, and the *Court of Queen's Bench Rules*.

Although the Executive Summary normally provides an overview of all the recommendations contained in a Report, we have felt that, in view of the nature and length of this particular report and the number of recommendations made, we should concentrate on those recommendations which we believe are of the greatest importance, particularly in the section regarding the most important legislation, *The Wills Act*.

B. *THE WILLS ACT*

Like the wills legislation of many other common law jurisdictions, Manitoba's *Wills Act* is based on the English *Wills Act 1837*, which was an attempt to rationalize and simplify the law as it then stood. Over time, however, it became apparent that the legislation also required simplification and rationalization, and numerous reviews have been undertaken, and recommendations made, in Manitoba and elsewhere with respect to the *Wills Act 1837* and its progeny.

The Commission makes several recommendations relating to the requirements for execution of a will so as to reduce the likelihood of part or all of a will being ruled invalid on technical grounds.

In the Commission's opinion, so-called "privileged wills" (*i.e.*, those available only to military personnel, seamen, and mariners) ought to be abolished (albeit not retroactively) as they are obsolete in light of current technology and practice and other legislative provisions.

In light of the sophistication of today's youth, the Commission believes that the age at which a valid will may be executed should be reduced from 18 to 16. It also recommends that the definition of "handwriting" be extended to include mouthwriting, footwriting, and similar kinds

of writing. The question of whether videotape, cinematographic, and electronic wills should b admissible to probate is a vexing one, but the Commission considers that, on balance, they shoul not be and, accordingly, proposes that the Act be amended to clarify that position.

Handwritten postscripts to holograph wills have not been valid since amendments to th Act in 1983, but the Commission believes that they should be. The Act provides that publicatio of a will is not necessary to its validity; the Commission recommends that it also expressly provid that testimonium and attestation clauses are similarly unnecessary to formal validity.

The Act's provisions dealing with the ademption of gifts are, in the Commission's opinio inadequate, and should be amended in certain respects. One amendment would prevent th ademption of gifts in certain specified situations; another would prevent ademption of the proceed of sale of property, as long as they could be traced. These amendments would bring the Act mo into line with similar legislation in Ontario and other provinces.

The conflict of law rules set out in the Act reflect the principle of scission, providi different choice of law rules depending on whether a gift is a gift of an interest in movables or interest in land. Most academic commentators have recommended that the distinction should abolished. The Commission is similarly of the opinion that the distinction is no longer warrante and recommends that a single set of conflict of law rules be adopted, based on the Hag Convention, attached as Appendix B.

Whether or not the recommendation regarding the Hague Convention is adopted, t Commission recommends several additional amendments to clarify the terminology used in t conflict of law sections of the Act. For example, the Act presently distinguishes between "interest in movables" and an "interest in land," rather than an "interest in immovables," a situati which should be rectified. In addition, the Commission recommends that the conflict of laws ru should deal with the capacity of the testator, something presently outside the scope of those rul The Commission also believes that the same single set of conflict of law rules should apply to t destruction of wills as to their creation.

Still under the heading of conflict of law rules, the Commission notes that the common l is unclear about what law applies to the revocatory effect of a subsequent divorce on testament provisions dealing with immovables. The Commission recommends that, with respect to b movables and immovables, the effect of divorce or annulment of marriage should be determi by the testator's domicile at the time of the decree.

Finally, the common law provides that in construing a will a court should initially atte to give effect to the testator's intention without reference to rules and presumptions of law. must refer to law, the court should, if possible, refer itself to the law intended by the testa Additional steps should only be taken if necessary. The Commission recommends that th common law rules should be codified in their entirety in the Act, instead of only partially a present.

The Commission has also considered the "absolute and remainder gift conundrum". When a testator words a gift in absolute terms and adds words that apparently give a remainder estate to someone else, the outcome will differ according to which of two interpretations regularly applied by Canadian courts is adopted. According to one interpretation, the first phrase prevails and the remainder estate is invalid because it is repugnant to the initial absolute gift; under the other interpretation, the subsequent wording limits the initial gift to a mere life estate. The Commission considers that a statutory rule of construction is necessary to remove the existing uncertainty in the law. Having decided that a statutory rule is required, we have struggled with the question of what that rule should be. We considered a number of options but were unable to reach a consensus, a problem reminiscent of many judicial decisions on this point. The majority of the Commission considers, in the end, that the rule should provide that the first gift is absolute, notwithstanding the purported remainder gift.

As befits the single most important piece of succession legislation in Manitoba, the Commission has made many additional recommendations for amendments to *The Wills Act*. These range from the inclusion of a complete, consolidated listing of the formal requirements for a valid will, through permitting the revival of a will that was revoked through destruction, to reversing the common law presumption that an *inter vivos* gift from a parent to a child is presumed to be an advancement.

C. *THE LAW OF PROPERTY ACT*

When a will does not contain a provision designating assets of the estate to be used to pay debts, funeral expenses, and the costs of administering the estate, or to the extent that the assets designated are insufficient, the common law of abatement applies. The provisions in *The Law of Property Act* that are intended to supersede the common law of abatement are unnecessarily verbose and unclear, and the Commission recommends that they be rewritten, and amended to permit a testator to override them. The Commission also recommends that *The Wills Act* be amended so that other common law distinctions between the treatment of real and personal property on an intestacy are abolished.

Finally, there is no reason why different statutorily prescribed rules of abatement should apply to the satisfaction of debts, funeral expenses, and costs of administration on a testacy, the satisfaction of equalization payments under *The Marital Property Act*, and orders under *The Dependants Relief Act*; accordingly, the Commission recommends that these be harmonized.

D. *THE INTESTATE SUCCESSION ACT*

The Commission recommends amending *The Intestate Succession Act* to make it explicit that great-great grandparents and their issue, and other more remote relatives, are not entitled to inherit under the Act. The Commission also recommends amendments to the provision that deals

with advancements, so that it applies both to whole and partial intestacies, and so that it applies regardless of when the deceased declares a gift to be an advancement.

At common law, two different choice of law rules apply to intestate succession: the *lex situs* governs immovables, and the *lex domicilii* governs movables. As it did with *The Wills Act*, the Commission recommends the adoption of a single choice of law rule in the Act as it applies to both movables and immovables, based on the provisions of the Hague Convention. Also in line with its recommendation regarding *The Wills Act*, the Commission recommends that successors be required to survive the deceased by 30 days in order to maintain their entitlement under the Act.

E. *THE MARITAL PROPERTY ACT*

The Commission recommends that the two sections in *The Marital Property Act* that deal with the waiver of rights under the Act ought to be amended to be consistent with one another. The section dealing with the interaction between the Act and *The Intestate Succession Act* ought also to be amended to clarify exactly how it is intended to operate.

F. *THE DEPENDANTS RELIEF ACT*

Because the sole purpose of *The Dependants Relief Act* is to make reasonable provision for the maintenance and support of dependants of testators, the Commission is of the opinion that personal representatives of deceased dependants ought not to be permitted to apply, or continue an application, for relief under the Act.

The Act permits a dependant to apply to the court to suspend the administration of a deceased's estate. The definition of a "dependant" in the Act does not, however, include an adult child who is not actually dependent on the deceased at the time of death but could later be in need; the Commission recommends that the Act be amended to permit an application by such a person.

The court is empowered by the Act to allow late applications under certain specified circumstances. The Commission believes that those circumstances are unduly narrow, and recommends that the court be given greater latitude to allow late applications.

The Commission believes that the Act would be more helpful to personal representatives if it expressly informed them that distribution of an estate is stayed for the duration of the six month limitation period within which dependants may commence an application under the Act.

As well, the Commission believes that a dependant's financial responsibilities for his or her own dependants should be considered in the calculation of the amount required for that person's maintenance and support and, accordingly, that the Act should expressly direct the court to take such responsibilities into account.

For the reasons cited earlier in the discussion of *The Wills Act* and *The Intestate Succession Act*, the Commission considers that the provisions of the Act dealing with conflicts of laws ought to be amended to bring it into line with well established conflict of laws rules. The Act ought also to codify the case law that provides that a dependant does not have to be either a resident or domiciliary to have status to apply for relief under the Act.

On occasion, dependants will enter into a contractual arrangement under which they are foreclosed from making an application under the Act. Although there are reasons why such arrangements ought to be enforced by the court, the Commission considers that it is most appropriate for the court merely to consider an agreement as one factor to be weighed in the balance. The Act should be amended to make it clear to all parties that this is the approach that will be taken by the court.

Persons may also from time to time enter into contractual agreements to dispose of certain property under their will in a particular way. The Commission is of the opinion that, to the extent such agreements are entered into for adequate consideration, the property so disposed of ought not to be available for an order under the Act.

The lack of a general anti-avoidance provision in the Act similar to that found in *The Marital Property Act* can defeat a claim by a surviving spouse with an entitlement to additional relief under the Act. The Commission recommends that the Act be amended to include such a provision.

Finally, it has been suggested that *The Dependants Relief Act* ought to be amended to empower the court to award relief to dependants who have provided services to the deceased in expectation of payment, or who have significantly assisted the deceased in the acquisition or maintenance of his or her estate. The Commission is opposed to the notion of empowering the courts to make such morality-based awards.

G. *THE TRUSTEE ACT*

The law of Manitoba is unclear about what happens in circumstances where an executor dies before completing the administration of an estate, and the will does not appoint a succeeding executor. The Commission recommends that *The Trustee Act* be amended to ensure that the succeeding executor is likely to have been known to the deceased.

H. *COURT OF QUEEN'S BENCH RULES*

The Commission recommends that the provision in the *Court of Queen's Bench Rules* that deals with "suspicious circumstances" that could prevent the probate of a will should be amended to clarify the types of circumstances to which it applies.

RAPPORT SUR LES LOIS RELATIVES AUX TESTAMENTS ET AUX SUCCESSIONS

RÉSUMÉ

A. INTRODUCTION

Ce rapport est une étude des lois manitobaines sur les successions qui vise à assurer leur intégrité et leur pertinence et à ce que ces lois fonctionnent globalement de la manière la plus efficace et la plus harmonieuse possible. Le rapport se concentre sur la *Loi sur les testaments*, mais traite également des dispositions connexes de plusieurs autres textes juridiques (*Loi sur les droits patrimoniaux*, *Loi sur les successions ab intestat*, *Loi sur les biens matrimoniaux*, *Loi sur l'aide aux personnes à charge*, *Loi sur les fiduciaires* et *Règles de la Cour du Banc de la Reine*).

Même si le résumé donne généralement un aperçu de toutes les recommandations figurant dans un rapport, nous avons jugé que, compte tenu de la nature et de la longueur de ce rapport et du nombre de recommandations formulées, il était préférable de nous concentrer sur les recommandations que nous jugeons les plus importantes, en particulier dans la section consacrée à la principale loi, la *Loi sur les testaments*.

B. *LOI SUR LES TESTAMENTS*

À l'instar des lois sur les testaments en vigueur dans de nombreux autres régimes de common law, la *Loi sur les testaments* du Manitoba repose sur la *Wills Act 1837* anglaise, qui visait à rationaliser et à simplifier le droit de l'époque. Avec le temps, il est toutefois devenu clair que cette loi devait elle-même être simplifiée et rationalisée; de nombreux examens ont été effectués et des recommandations faites, au Manitoba et ailleurs, relativement à la *Wills Act 1837* et aux lois qui en dérivent.

La Commission présente plusieurs recommandations concernant la signature d'un testament afin de réduire la probabilité qu'une partie ou l'ensemble d'un testament soit déclaré invalide pour des questions de forme.

Selon la Commission, les testaments dits « privilégiés » (c.-à-d., ceux réservés au personnel militaire ou aux marins) devraient être abolis (sans que cette abolition soit rétroactive), car ils sont tombés en désuétude compte tenu de la technologie et des pratiques actuelles et d'autres dispositions juridiques.

Étant donné le degré de connaissances des jeunes d'aujourd'hui, la Commission estime que l'âge auquel un testament valide peut être signé devrait être réduit de 18 à 16 ans. Elle

recommande également que la référence à la rédaction à la main soit élargie à l'écriture par la bouche, le pied ou d'autres moyens similaires. Face à la question épineuse consistant à déterminer si les testaments établis sur bande vidéo, sur film ou par voie électronique peuvent être homologués, la Commission estime que, tout bien pesé, ils ne devraient pas l'être, et elle propose en conséquence que la *Loi* soit modifiée pour éclaircir ce point.

Les post-scriptum rédigés à la main sur les testaments olographes ne sont pas valides depuis les modifications apportées à la *Loi* en 1983, mais la Commission pense qu'ils devraient l'être. La *Loi* stipule qu'un testament est valable sans aucune forme de publicité; selon la Commission, elle devrait aussi indiquer expressément que les clauses à l'attestation ou aux témoins sont elles aussi superflues et sans effet sur la validité officielle.

Les dispositions de la *Loi* se rattachant à l'extinction des legs sont, de l'avis de la Commission, inappropriées et devraient être modifiées à certains égards. Une de ces modifications empêcherait l'extinction des legs dans certains cas particuliers; une autre empêcherait l'extinction du produit de la vente d'une propriété, dans la mesure où l'on peut établir ce produit avec certitude. Ces modifications harmoniseraient les dispositions de la *Loi* avec celles des lois de même nature de l'Ontario et d'autres provinces.

Les règles concernant le conflit de lois énoncées dans la *Loi* reflètent le principe de la scission : il existe différentes règles relatives au choix de la législation applicable selon la nature du legs, à savoir un intérêt mobilier ou un intérêt foncier. La plupart des exégètes recommandent l'élimination de cette distinction. La Commission pense également que cette dernière ne se justifie plus et recommande à l'égard du conflit de lois l'adoption d'un seul ensemble de règles inspiré de la *Convention de La Haye* (voir l'annexe B).

Que la recommandation relative à la *Convention de La Haye* soit adoptée ou pas, la Commission recommande l'apport de plusieurs autres modifications visant à éclaircir la terminologie utilisée dans les articles de la *Loi* consacrés au conflit de lois. Par exemple, la *Loi* établit pour l'instant une distinction entre un « intérêt mobilier » et un « intérêt foncier » plutôt qu'un « intérêt immobilier », ce qu'il conviendrait de rectifier. Par ailleurs, la Commission recommande que les règles applicables au conflit de lois traitent de la capacité du testateur, ce qui n'est pas le cas actuellement. La Commission estime de plus qu'un même ensemble de règles concernant le conflit de lois devrait s'appliquer à la destruction des testaments et à leur création.

Toujours pour ce qui est des règles concernant le conflit de lois, la Commission souligne que la common law ne désigne pas clairement la loi applicable à l'effet révocatoire d'un divorce ultérieur sur les dispositions testamentaires liées aux biens immeubles. La Commission recommande que, à l'égard des biens meubles et immeubles, l'effet d'un divorce ou de l'annulation d'un mariage devrait être établi selon le domicile du testateur au moment du jugement.

Finalement, la common law stipule que, pour interpréter un testament, un tribunal devrait

d'abord respecter l'intention du testateur, sans s'appuyer sur les règles de droit ou les présomptions légales. Si une référence au droit est nécessaire, le tribunal devrait, dans la mesure du possible, utiliser la loi sur laquelle le testateur s'est fondé. Des mesures supplémentaires ne devraient être prises que si cela s'impose. La Commission recommande que ces règles de common law soient entièrement codifiées dans la *Loi*, plutôt que partiellement comme c'est le cas actuellement.

La Commission a également examiné le « dilemme entre le legs absolu et le reliquat ». Lorsqu'un testateur rédige un legs en termes absolus et ajoute une mention donnant apparemment un reliquat à une autre personne, la décision variera selon le choix de l'une des deux interprétations généralement appliquées par les tribunaux canadiens. Selon une de ces interprétations, les premiers termes prévalent et le reliquat n'est pas valide du fait qu'il est inconciliable avec le legs absolu initial; selon l'autre interprétation, la mention ultérieure limite le legs initial à un simple domaine viager. La Commission estime qu'une règle légale sur l'interprétation est nécessaire pour éclaircir la loi. Après avoir décidé qu'une règle légale s'imposait, nous avons tenté de définir cette règle. Nous avons examiné plusieurs options sans parvenir à un consensus, ce qui n'est pas sans rappeler de nombreuses décisions judiciaires sur ce point. La majorité des membres de la Commission estiment à cet égard que la règle devrait établir que le premier legs est absolu, ignorant ainsi le prétendu reliquat.

La *Loi sur les testaments* étant la principale loi manitobaine sur la succession, la Commission a recommandé de nombreuses autres modifications à sa formulation actuelle. Mentionnons par exemple l'ajout d'une liste complète des exigences formelles sur lesquelles repose la validité d'un testament, l'autorisation de la remise en vigueur d'un testament révoqué en raison de sa destruction et l'annulation de la présomption de common law selon laquelle une donation entre vifs d'un parent à un enfant serait un avancement.

C. *LOI SUR LES DROITS PATRIMONIAUX*

Lorsqu'un testament ne contient aucune disposition désignant les biens de la succession qui serviront à payer les dettes, les frais funéraires et les coûts d'administration de la succession, ou lorsque les biens désignés sont insuffisants, la common law relative à la réduction s'applique. Les dispositions de la *Loi sur les droits patrimoniaux* visant à remplacer la common law sur ce point sont bien trop verbeuses et confuses, et la Commission recommande qu'elles soient reformulées, en les modifiant pour permettre à un testateur passer outre. La Commission recommande également que la *Loi sur les testaments* soit modifiée de façon à abolir les autres distinctions de common law entre le traitement des biens réels et celui des biens personnels dans une succession ab intestat.

Finalement, rien ne justifie que des règles légales différentes concernant la réduction s'appliquent au règlement des dettes, des frais funéraires et des coûts d'administration d'un testament, aux paiements du montant de la compensation en vertu de la *Loi sur les biens matrimoniaux* et aux ordonnances en vertu de la *Loi sur l'aide aux personnes à charge*; la

Commission recommande donc l'harmonisation de ces règles.

D. *LOI SUR LES SUCCESSIONS AB INTESTAT*

La Commission recommande de modifier la *Loi sur les successions ab intestat* pour éclaircir le fait que les arrière-grands-parents et leurs descendants, ainsi que d'autres parents plus éloignés, n'ont pas le droit à l'héritage en vertu de la *Loi*. La Commission recommande également de modifier la disposition traitant des avancements, de manière à ce qu'elle s'applique à la fois aux successions ab intestat entières et partielles, quel que soit le moment auquel le défunt a déclaré que le don constituait un avancement.

Selon la common law, deux règles différentes concernant le conflit de lois s'appliquent à la succession ab intestat : la *lex situs* régit les biens immobiliers et la *lex domicilii* régit les biens mobiliers. Comme elle l'a fait pour la *Loi sur les testaments*, la Commission recommande l'adoption dans la *Loi* d'une seule règle à cet égard, qui s'appliquerait autant aux biens mobiliers qu'aux biens immobiliers, à partir des dispositions de la *Convention de La Haye*. Parallèlement à cette même recommandation concernant la *Loi sur les testaments*, la Commission suggère que, pour conserver leur droit en vertu de la *Loi*, les successeurs doivent survivre au défunt pendant 30 jours.

E. *LOI SUR LES BIENS MATRIMONIAUX*

La Commission recommande que les deux passages de la *Loi sur les biens matrimoniaux* portant sur la renonciation des droits en vertu de la *Loi* soient modifiés pour concorder l'un avec l'autre. Le passage consacré aux liens entre cette loi et la *Loi sur les successions ab intestat* devrait également être modifié de manière à préciser exactement le mode d'application visé.

F. *LOI SUR L'AIDE AUX PERSONNES À CHARGE*

Étant donné que la *Loi sur l'aide aux personnes à charge* a pour seul objet d'établir une provision raisonnable pour l'entretien et le soutien des personnes à charge des testateurs, la Commission estime que les représentants personnels de personnes à charge décédées [redacted] devraient [redacted] être autorisés à déposer une demande d'aide en vertu de la *Loi* ou à poursuivre une telle demande.

La *Loi* permet à une personne à charge de présenter une demande pour suspendre l'administration de la succession d'un défunt. La définition du terme « personne à charge » utilisée dans la *Loi* n'englobe toutefois pas les enfants adultes qui ne sont pas à la charge du défunt au moment de son décès, mais qui pourraient être plus tard dans le besoin; la Commission recommande que la *Loi* soit modifiée pour que ces personnes puissent déposer ce genre de demande.

Les tribunaux peuvent en vertu de la *Loi* autoriser des demandes tardives dans certaines circonstances précisées. La Commission juge ces circonstances trop limitatives et recommande que le tribunal jouisse d'une plus grande liberté à l'égard des demandes tardives.

La Commission estime que la *Loi* serait plus utile aux représentants personnels si elle les informait expressément que le règlement de la succession était reporté jusqu'à expiration du délai de prescription de six mois au cours duquel les personnes à charge peuvent présenter une demande en vertu de la *Loi*.

De même, la Commission considère que les responsabilités financières d'une personne à charge à l'égard de ses propres personnes à charge devraient être prises en compte dans le calcul de la somme nécessaire à l'entretien et au soutien de cette personne et, en conséquence, que la *Loi* devrait exiger du tribunal qu'il tienne compte de ces responsabilités.

Pour les raisons citées précédemment lors de la discussion sur la *Loi sur les testaments* et la *Loi sur les successions ab intestat*, la Commission estime que les dispositions de la *Loi* liées au conflit de lois devraient être modifiées par souci d'harmonisation avec les règles établies dans ce domaine. La *Loi* devrait également codifier la jurisprudence qui établit qu'une personne à charge peut être admissible à une demande d'aide en vertu de la *Loi* sans toutefois avoir le statut domiciliaire ou de résidant.

Dans certains cas, les personnes à charge concluent une entente contractuelle leur interdisant de présenter une demande en vertu de la *Loi*. Même s'il existe des raisons justifiant l'application de telles ententes par les tribunaux, la Commission estime que le tribunal ne devrait considérer ce genre d'entente que comme l'un des facteurs influant sur leur décision. La *Loi* devrait être modifiée pour signifier clairement à toutes les parties que cette démarche sera suivie par les tribunaux.

Il peut également arriver que des parties concluent une entente contractuelle pour se défaire d'une façon précise d'un bien inclus au testament. La Commission est d'avis que, dans la mesure où de telles ententes sont conclues pour des contreparties suffisantes, le bien dont on se défait de cette manière ne devrait pas pouvoir faire l'objet d'une ordonnance rendue en vertu de la *Loi*.

L'absence dans la *Loi* d'une disposition anti-échappatoire générale semblable à celle figurant dans la *Loi sur les biens matrimoniaux* peut faire obstacle à la demande d'un conjoint survivant au droit à une aide supplémentaire en vertu de la *Loi*. La Commission recommande que la *Loi* soit modifiée pour inclure une disposition de cette nature.

Enfin, il a été suggéré par certains que la *Loi sur l'aide aux personnes à charge* soit modifiée pour donner au tribunal le pouvoir d'accorder une aide aux personnes à charge qui ont rendu au défunt des services en s'attendant à recevoir un paiement, ou qui ont apporté un soutien substantiel au défunt pour l'acquisition ou l'entretien de sa succession. La Commission s'oppose à l'attribution aux tribunaux du pouvoir d'accorder des aides à partir de critères de ce genre fondés

sur la moralité.

G. *LOI SUR LES FIDUCIAIRES*

Le droit du Manitoba est imprécis quant à la voie à suivre lorsqu'un exécuteur meurt avant d'avoir achevé l'administration d'une succession et que le testament ne désigne pas d'exécuteur pour le remplacer. La Commission recommande que la *Loi sur les fiduciaires* soit modifiée de manière à assurer que l'exécuteur suppléant était probablement connu du défunt.

H. *RÈGLES DE LA COUR DU BANC DE LA REINE*

La Commission recommande que les dispositions des *Règles de la Cour du Banc de la Reine* portant sur les « circonstances suspectes » qui pourraient empêcher l'homologation d'un testament soient modifiées pour éclaircir le genre de circonstances auxquelles elles s'appliquent.